Subject Index A

	Pages
Brief of the argument	9
Defendants' combination is unlawful	22
Effect of the rules and regulations of appellees	34
Effect of the Shipping Commissioner's Act	39
Plaintiff was entitled to injunctive relief	20
Plaintiff had a right to bring a class suit	33
Review of decision of lower court	39
Specifications of error	6
Statement of facts	1

Subject Index B

(a) The combination of the appellees herein is against public policy 9-10

(b) The restriction of appellees upon the right of appellant's and those on whose behalf he sues to dispose of their labor in open market, is the taking of property without due process of law 9-18

(c) The rules and regulations imposed by the combination of appellees are regulations of interstate and foreign commerce, which under the Constitution of the United States, none but Congress can make, and their imposition upon appellant and other seamen as a condition of obtaining employment, is likewise the taking of property without due process of law 9-19

Cases Cited

	Page
Atkins v. W. A. Fletcher Co., 65 N. J. Eq. 658-666	21
Beatty v. Kurtz, 2 Peters 563-583-4	23
Berry v. Donovan, 188 Mass. 353-355-6	16
Callon v. Hope, 75 Fed. 758	33
Curran v. Galen, 152 N. Y. 33-37	11
Duplex v. Deering, 254 U. S. 443-464	21
Duplex v. Deering, 254 U. S. 443-464	33
Erdman v. Mitchell, 207 Pa. St. 79	15
Florence v. Helms, 136 Cal. 613	33
Gable v. Vobbegut Shoe Co., 274 Fed. 66	21
Gieske v. Anderson, 77 Cal. 247	33
Gleason v. Thaw, 185 Fed. 245-347	18
Gompers v. Buck Stove & Range Co., 221 U. S. 418-438	34
Hilton v. Eckersley, Y. Ellis & B. 47	10
Jones v. Leslie, 61 Wash. 107-110	16
Kenney v. Blake, 125 Fed. 672	23
Loewe v. Lawlor, 208 U. S. 303-4	27
Mogul S. S. Co. v. McGregor, 23 Q. B. (1889) 598-603	12
Patterson v. Bark Eudora, 190 U. S. 169	30
People v. McFarlin, 89 N. Y. S. 527	18
Plant v. Woods, 176 Mass. 498	12
Sailors Union v. Hammond L. Co., 156 Fed. 454	18
Slaughter House Cases, 16 Wall. 36-127	18
State v. Chapman, 55 Atl. 94	18
The Lottawanna, 21 Wall. 558-577	22
The Passenger Cases, 7 Howard 232-407	22
The Troop, 117 Fed. 557	23
Thomsen v. Cayser, 243 U. S. 66	23
Wheelock v. First Pres. Church, 119 Cal. 477	33
Wilson v. New, 243 U. S. 332	28

Constitution, Statutes, Acts, Cited

	Pages
U. S. Constitution, Sec. 8, Ar. 1, Clause 3	23
Clayton Act, Sec. 16	21, 40, 42
Judiciary Act, Sec. 238	5
U. S. Revised Statutes,	
Section 4501	7, 24
4507	6, 24
4508	6, 24
4514	27, 41
4515	27, 41
4551	25
4612	25
Equity Rules, Sec. 38	33
Reports of Public Bodies,	
U. S. Dep. of Labor Bureau Phamphlet No. 235	35
U. S. Shipping Board	36

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1922

No. 704

ALFRED STREET, suing on behalf of himself and all other seamen engaged in interstate and foreign commerce by sea on vessels flying the flag of and engaged in the merchant service of the United States of America and sailing to and from ports on the Pacific Coast of the United States of America,

Appellant,

vs.

SHIPOWNERS' ASSOCIATION OF THE PACIFIC COAST and PACIFIC AMERICAN STEAMSHIP ASSOCIATION,

Appellees.

} In Equity

BRIEF FOR APPELLANT.

Statement of Facts.

This action is brought to this court on an appeal from a final decree of the Second Division of

the District Court of the United States, for the Northern District of California, Southern Division, sustaining motions to dismiss appellant's complaint and dismissing his complaint which was filed in that court on May 1, 1922, and which prayed for injunctive relief against defendants to restrain them from continuing to carry out acts relating to the shipment of seamen engaged in interstate and foreign commerce by sea, complained of in the complaint.

The complaint alleges, that plaintiff is a native born citizen of the United States and of the State of California, at the time of the filing of the complaint he was, and for many years prior thereto he had been a seaman engaged in interstate and foreign commerce by sea, in working on steam vessels that carried passengers and cargo between different ports in the several states on the Pacific Coast of the United States of America and also between such ports and foreign ports, and was desirous of continuing so to work on such vessels. (Par. 1 of Complaint, page 1 of Trans.)

That he was associated by and through the International Seamen's Union an unincorporated association of persons with over ten thousand other persons similarily situated as he was and brought the action in his own behalf and in behalf of all such seamen. (Page 2 of Trans.)

That defendants, Shipowners' Association of the Pacific Coast, and Pacific American Steamship

Association, with their respective members own, operate or control every vessel flying the flag of and engaged in the merchant service of the United States of America, in carrying passengers and cargo between the several ports of the Pacific Coast of the said United States of America, and such ports and foreign ports, and collectively employ all seamen so engaged. (Par. V, of Complaint, page 2 of Trans.)

That about the 1st day of January, 1922, the defendants combined together to restrain the freedom of plaintiff and all other seamen on the Pacific Coast of the United States from engaging in the trade and commerce aforesaid, and to that end they established and then maintained an office at No. 84 Embarcadero, in San Francisco, California, and as a condition of so engaging they compelled all seamen desiring to so engage to do the following things at said office as a prerequisite to obtaining employment, to-wit:

To register his name and take a number.

To take his turn for employment according to such number. Which frequently prevented seamen of good qualifications from obtaining work at once which they would obtain on account of their superior qualifications and being well known.

To carry a book, which on its face is a continuous discharge book on which is printed among other things the following:

"Employment Service Bureau.
Pacific American Steamship Association, Shipowners' Assn., of the Pacific Coast,
San Francisco, California.

This certificate and discharge is issued under the authority of the Pacific American Steamship Association and the Shipowners' Association of the Pacific Coast, *and no person will be employed by these associations unless he is registered at their employment offices and has in his possession this Certificate and Discharge.*

The lawful holder of this certificate will deliver it to the master of the vessel when he signs articles of Agreement, and the master will retain the same in his possession until the seaman is discharged or has left the employment.

To Seamen.

When you receive this book you will be given a registered number which will be placed in the back of this book. When you leave your ship you must report to the Employment Service Bureau and get a new registered number. *This registration number is given you when you apply for a job* and has nothing to do with the number printed on the book. A fee will be charged for this book sufficient to cover the cost of the same.

That in addition to the foregoing each seaman applicant at said office for a position as a seaman in the trade and commerce aforesaid and receiving one of said books is required to have written therein his place of birth, his age, his date of birth, his height, his weight, the color of his hair, the color of his eyes, his complexion, his rating, the total years of his sea experience, his previous experience and employers, and have his photograph attached to said book." (Par. VII pages 3, 4 of Trans.)

That said matters are regulations of commerce among the several state and foreign nations, and have already been fully provided for by Congress, in so far as it is necessary, and the regulations of defendants appellees, complained of, were humiliating to all seamen, many of which refused to abide by them and are leaving the sea as a calling, and plaintiff-appellant refused to engage in such trade and commerce under such regulations and was suffering loss and damage because he could not obtain employment without obeying appellees' said rules and regulations for employment.

The grounds of the motions to dismiss were, lack of jurisdiction of the court, want of facts, want of equity, and that no question of common or general interest appeared. (Pages 6, 7, 8 of Trans.)

The ruling of the lower court was, in effect, that the complaint did not state facts sufficient to constitute a cause of action. (Pages 9, 10 of Trans.)

An order directing the dismissal of the complaint was made on the decision of Judge Dietrich, and a decree thereafter given and made thereon from which this appeal is taken directly to this court under Sec. 238 of the Judiciary Act, as the case involves the application of the Constitution of the United States.

The case having been decided on motions to dismiss, necessarily the allegations of the complaint are admitted to be true.

The italics throughout this brief are ours.

Specifications of Error.

Appellant relies on each of his assignments of error, they being found on pages 13, 14 and 15 of the Transcript of Record and read:

"That the District Court of the United States, for the Southern Division, Northern District of California, Second Division, in giving its opinion and rendering its final decree of October 14th, 1922, erred as follows:

1. In not findng and deciding that the rules prescribed by defendants to enable seamen to engage in interstate and foreign commerce were regulations of such interstate and foreign commerce, and within the exclusive power of The Congress of the United States to make under the provisions of subdivision 3 of Section 8 of Article I of the Constitution of the United States.

2. In not finding and deciding that the provisions of Section 4508 of the Revised Statutes of the United States are exclusive, as such provisions are made exclusive by the provisions of Section 4515 of said Revised Statutes.

3. In finding and deciding that the duties of a United States Shipping Commissioner as provided by the Revised Statutes of the United States, are exclusive.

22 4. In not finding and deciding, that the provisions of Sections 4507 and 4508, of the Revised Statutes of the United States, provide the exclusive manner in which the acts therein mentioned shall be performed.

5. In finding and deciding that Sections 4507 and 4508 of the Revised Statutes of the United States, do not provide the exclusive manner in which the acts therein mentioned shall be performed.

6. In not finding and deciding that the provisions of the Revised Statutes of the United

States, relating to the supplying, engagement and discharge of seamen in interstate and foreign commerce provide the exclusive manner in which each thereof shall be accomplished.

7. In finding and deciding 'the plaintiff is not shown to have any standing entitling him to seek in court the general relief for which he prays,' as it is alleged in the complaint and is admitted to be true that plaintiff is a seaman and desires to engage as such in interstate and foreign commerce, and defendants declare 'no person will be employed by these associations unless he is registered at their employment offices and has in his possession this Certificate and discharge,' to-wit, the certificate and discharge mentioned in the complaint herein.

8. In finding and deciding, 'Nor does he connect himself with the rule or practice of which he complains,' as the allegations of the complaint which are admitted to be true, show that he does.

9. In not finding and deciding, that plaintiff's constitutional rights were violated by defendants' rules of employment, the compliance of which by him, were a pre-requisite to his engaging in interstate and foreign commerce.

10. In not finding and deciding that plaintiff was entitled to the relief he prays for, as the court found, 'they (defendants) may possibly violate some of the provisions of the Shipping Commissioners' Act (Rev. State., U. S. Sec. 4501, et seq.).'

11. In finding and deciding, in effect, that plaintiff could be compelled to do more than the law required him to, in order for him to engage in interstate and foreign commerce.

23 12. In not finding and deciding that the rules prescribed by defendants the complying of which by plaintiff were necessary to

enable him to sell his labor and engage in interstate and foreign commerce, were the taking of plaintiff's labor, to-wit, his property, without due process of law.

13. In sustaining each of the motions to dismiss herein.

14. In sustaining each of the grounds given by each of the defendants in their motions to dismiss herein.

15. In deciding that it had no jurisdiction of the subject matter of plaintiff's complaint.

16. In deciding that it had no jurisdiction either to hear or determine plaintiff's suit.

17. In finding and deciding that plaintiff's bill of complaint was without equity.

18. In finding and deciding that the facts alleged in plaintiff's complaint were not sufficient to constitute a valid cause of action in equity.

19. In finding and deciding that the facts stated in plaintiff's complaint did not state facts sufficient to constitute a cause of action in equity in favor of the class of persons in whose behalf plaintiff sued in addition to himself.

20. In granting each of defendant's motions to dismiss herein.

21. In giving and making the decree dismissing plaintiff's complaint.

22. In not finding and deciding that plaintiff has a constitutional right to engage in interstate and foreign commerce only under such rules and regulations as were made by The Congress of the United States.

23. In not finding and deciding that the rules prescribed by defendants in the discharge of seamen engaged in interstate and foreign commerce were in violation of the Constitution of the United States.

24-27 24. In not finding and deciding that the rules prescribed by defendants in the

supplying of seamen engaged in interstate and foreign commerce and in their engagement were in violation of the provisions of the Constitution of the United States.

25. In not finding and deciding that it was within the exclusive power of a United States Shipping Commissioner to keep an office for the furnishing of seamen to engage in interstate and foreign commerce, and in such office.

'To afford facilities for engaging seamen by keeping a register of their names and character.'

'To superintend their engagement and discharge, in manner prescribed by law.'

'To provide means for securing the presence on board at the proper time of men who are so engaged.' "

Brief of the Argument.

I.

The contentions of appellant herein are as follows:

(a) The combination of the appellees herein is against public policy.

(b) The restriction of appellees upon the right of appellant's and those on whose behalf he sues to dispose of their labor in an open market, is the taking of property without due process of law.

(c) The rules and regulations imposed by the combination of appellees are regulations of interstate and foreign commerce, which under the Constitution of the United States, none but Congress can make, and their imposition upon appellant and other seamen as a condition of obtaining employment, is likewise the taking of property without due process of law.

(a)

In this case appellees have combined together in the matter of hiring their men, necessarily one member of appellees surrenders his right to select a particular man, and surrenders his will in all the matters relating to the hiring of seamen to the will of the majority. That has uniformly been held to be against public policy, as if permitted, it would only be a question of time when such combinations would be able to promulgate rules that would reduce workmen to a condition of peonage.

A similar matter came up in the case of Hilton v. Eckersley, 6 Ellis & Blackburn 47, in which case all of the master cotton spinners in Wigan, County of Lancaster, combined together and each executed a bond, a part of the conditions of which were as follows:

> "and therefore the said several obligors have agreed to carry on their said works, in regard to the amount of wages to be paid to persons employed therein, and the times or periods of the engagement of work people, and the hours of work, and the suspending of work, and the general discipline and management of their said works and establishment in conformity to law.

One of the combination violated the agreement and upon being sued on the bond pleaded that there was no consideration for the execution of the bond and that the bond was in restraint of trade, illegal and void.

The case first came up in the Court of Queen's Bench, where the bond was held illegal and against public policy. It then went to the Exchequer Chamber, where the judgment was affirmed, Lord Alderson saying on page 74:

> "Secondly, they can only employ persons for such times and periods as the majority may fix on, however much the minority may deem it for their own interest to do otherwise. The hours of work, the suspending of work, partially or altogether, the discipline and management of their establishments, is to be regulated by others forming a majority, and taken from every individual member. And all this for a fixed period of twelve months. All these are surely regulations restraining each man's power of carrying on his trade according to his discretion, for his own best advantage, and therefore are restraints of trade not capable of being enforced."

Any man who can not earn a living at his calling except by obeying rules and regulations of an illegal body, is deprived of his property right to earn a living without due process of law.

Curran v. Galen, 152 New York 33, 37.

> "Public policy and the interests of society favor the utmost freedom in the citizen to pursue his lawful trade or calling, and if the purpose of an organization or combination of workingmen be to hamper, or to restrict, that freedom, and, *through contracts or arrangements with employers* to coerce other workingmen to become members of the organization and to come under its rules and conditions, under the penalty of the loss of their position, and of deprivation of employment, then that purpose

seems clearly unlawful and militates against the spirit of our government and the nature of our institutions. The effectuation of such a purpose would conflict with the principle of public policy, which prohibits monopolies and exclusive privileges. *It would tend to deprive the public of the services of men in useful em-employments and capacities.* It would, to use the language of Mr. Justice Barrett in People ex rel Gill v Smith (5 N. Y. Cr. Rep. at p. 513), *'impoverish and crush a citizen for no reason connected in the slightest degree with the advancement of wages, or the maintenance of the rate.'*

Every citizen is deeply interested in the strict maintenance of *the constitutional right freely to pursue a lawful avocation* under conditions equal to all, and to enjoy the fruits of his labor, *without the imposition of any conditions not required for the general welfare of the community."*

Plant v. Woods, 176 Mass. 492-498,

"Everyone has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition; *but he has a right to be free from malicious and wanton interference, disturbance or annoyance.* If disturbance or loss * * * come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands on a different footing."

There is no difference in principle between this case and those of The Mogul Steamship Company, Limited v. McGregor et al., 23 Queen's Bench (1889) 598.

In that case several steamship companies had combined together to control the carrying trade of tea from Hankow and Shanghai to England, The Mogul Steamship Company was refused admittance into the agreement, and thereupon sent two steamers to Hankow in order to obtain freights independently; thereupon, the combination lowered freight rates to such a figure that it was impossible to carry at a profit, for the purpose of forcing plaintiff out of that business. The question of the right of plaintiffs in that case to use their steamers in business was the question involved, and the learned court, speaking through the very able and distinguished Lord Esher, says as follows:

Page 603.

"It seems to me well to consider first what view the law takes of the agreement of April 7, 1884, renewed or enlarged in 1885. In Hilton v. Eckersley (4) a bond was executed by certain masters, by which they agreed to be bound to each other in a penalty, nominally payable to one of them, if any of them should carry on his works, in regard to amount of wages to be paid to persons employed therein, and as to the times or periods of the engagement of workpeople and the hours of work, otherwise than in conformity with the resolutions of the majority of the said masters. The defendant, one of the signing masters, carried on his works contrary to a resolution of the others, whereupon he was sued on the bond for the penalty. Crompton, J., said: 'I am of the opinion that the bond is void, as being against public policy. I think that combinations like that disclosed in the pleadings in this case were illegal and indictable at common law, as tending directly to impede

with the free course of trade and manufacture'."

The combination of defendants in this case is squarely within what the court there declared was against public policy. In the Court of Exchequer Chamber, Lord Alderson said, quoted on the above mentioned page of 23 Queen's Bench Division,

"that the fact of the combination of masters being formed to counteract a combination of workmen cannot render the masters' combination legal".

Page 605.

"But before considering that point it must be observed that the agreements held to be illegal because in restraint of trade must have been so held, not because there was any wrong done to the traders who agreed,—for they all agreed to what was done—but because there was a wrong to the public. The restraining themselves from a free course of trade was held to be a wrong to the public. If that be so when parties agree to restrain themselves, it must be much more so when they agree to do acts which will restrain and are intended to restrain another trader from a free course of trade. That restraint is equally a wrong to the public. The present agreement is therefore illegal and void as in restraint of trade on that ground also."

In the case at bar, the combination of the different employers means that no one shall have the right to select his own employees, he must take them by the numbers as the men apply, there is a restraint on the employer in this case and necessarily a restraint upon the employee. On page 607,

23 Queen's Bench (1889), Lord Esher further proceeds:

> "At common law," says Sir W. Erle (page 6), "every person has individually, and the public also have collectively, a right to require that the course of trade should be kept free from unreasonable obstruction." "Every person has a right under the law, as between him and his fellow-subjects *to full freedom in disposing of his own labour* or his own capital *according to his own will.* It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others. Every act causing an obstruction to another in the exercise of the right comprised within this description—done, not in the exercise of the actor's own right, but for the purpose of obstruction—could, if damage should be cause thereby to the party obstructed, be a violation of this prohibition; and the violation of this prohibition by a single person is a wrong, to be remedied either by action or indictment, as the case may be. It is equally a wrong whether it be done by one or many—subject to this observation, that a combination of many to do a wrong, in a matter where the public has an interest, is a substantive offence of conspiracy."

The appeal was not allowed in that case, but the principles announced in Lord Esher's opinion are unquestionably the law as the following will show.

Erdman v. Mitchell, 207 Pa. St. 79,

> "The right to the free use of his hands is the workman's property, as much as the rich man's right to the undisturbed income from his factory, houses and lands. By his work he earns

present subsistence for himself and family. His savings may result in accumulations which will make him as rich in houses and lands as his employer. This right of acquiring property is an inherent indefeasible right of the workman. To exercise it, he must have the unrestricted privilege of working for such employer as he chooses, at such wages as he chooses to accept. This is one of the rights guaranteed him by our Declaration of Rights. It is a right of which the legislature cannot deprive him, one which the law of no trades union can take away from him, and one which it is the bounden duty of the courts to protect."

Berry v. Donovan, 188 Mass. 353, 355-366,

"The right to dispose of ones labor as he will, and to have the benefit of one's lawful contract, is incident to the freedom of the individual, which lies at the foundation of the government in all countries that maintain the principles of civil liberty. Such a right can be lawfully interfered with only by one acting in the exercise of an equal or superior right which comes in conflict with the other. An interference with such a right, without lawful justification, is malicious at law even if it is from good motives and without express malice."

Jones v. Leslie, 61 Wash. 107, 110.

"It would be well to remember, in the beginning, that it is fundamental that a man has a right to be protected in his property. This was the doctrine of the common law; is, and always has been, the law in every civilized nation. It is, of necessity, one of the fundamental principles of government, the protection of property being largely one of the objects of government. For the protection of life, liberty, and property, men have yielded up their natural rights and established governments. Is, then,

the right of employment in a laboring man property? That it is, we think cannot be questioned. The property of the capitalist is his gold and silver, his bonds, credit, etc., for in these he makes his living. For the same reason, the property of the merchant is his goods. And every man's trade or profession is his property, because it is his means of livelihood; because, through its agency he maintains himself and family, and is enabled to add his share towards the expenses of maintaining the government. Can it be said, with any degree of sense or justice, that the property which a man has in his labor, which is the foundation of all property and which is the only capital of so large a majority of the citizens of our country, is not property; or, at least, not that character of property which can demand the boon of protection from the government? We think not. To destroy this property, or to prevent one from contracting or exchanging it for the necessities of life, is not only an invasion of a private right, but is an injury to the public, for it tends to pauperism and crime. This relief has been granted to employers in many forms. Workmen have been enjoined from collecting about the employer's place of business for the purpose of ridiculing his employees with a view of causing them to stop work; and many other demonstrations of the same character and purpose have been enjoined, of course, on the theory that it was an unlawful act. To deny the same relief to the employee under similar circumstances would be a reproach to the law. It is true that in many cases the element of conspiracy existed, but the principle is the same. Nor have the courts refused this protection to employees, but in a vast majority of cases of the kind it has been held that a legal right has been invaded, and the law imposed a liability."

That is a case where an employee sued a former employer.

People v. McFarlin, 89 N. Y. Supp. 527,

"A calling, business or profession chosen to follow is property."

State v. Chapman, 55 Atlantic 94,

"Labor is property and as such merits protection. The right to make it available is next in importance to the right to life and liberty."

Slaughter House Cases, 16 Wallace 36, 127,

"The right to operate vessels and to conduct business is as much property as are the vessels themselves. All the rights which are incident to the use, enjoyment, and disposition of tangible things are property. Property is everything that has an interchangeable value." Mr. Justice Swayne in the Slaughterhouse Cases, 16 Wall. 127, L. Ed. 894, "Property may be destroyed, or its value eliminated. It is owned and kept for some useful purpose, and it has no value unless it can be used. In re Jacobs, 98 N. Y. 105."

Sailors Union of the Pacific v. Hammond Lumber Co., 156 Fed. 454;

(b)

Gleason v. Thaw, (C. C. A. 3rd Cir.) 185 Fed. 345, 347,

"Thus—man's right to labor, to carry on a lawful business, or to practice a lawful profession, may not be taken away from him *or be restricted* by any act of the state not within its police powers, *such act being considered as a deprivation of property within the constitutional inhibition, federal or state.* Such com-

bination or conspiracy to destroy or prevent the carrying on of the business of any person within the protection of law *may be enjoined as a threatened trespass upon a property right.* Such cases, however, are far from saying that services actually rendered under a supposed contract are themselves property, which have been taken fraudulently from the possession of the one who has rendered the service, within the meaning of that word as used in the section of the bankruptcy act now under consideration. It is one thing to say that a man's right to engage or sell his services according to his own volition may, for the purposes of its protection, be considered a species of property, and quite another to assert that services already rendered by one person to another are to be considered as property, in order to enlarge or change the ordinary remedies by which the debt due from the person to whom such services were rendered may be recovered. *The right to labor in any calling or profession in the future may be considered a property right, for the purpose of protection,* but no right exists as to labor or services already rendered, and there is nothing to protect, except the right of recovering due compensation therefor. In the latter case nothing has been transferred from the possession of the one who has rendered the services to the other, for whom the services were rendered. We must now allow ourselves, by a subtle verbal casuistry, to confuse a concept of the right to work or render service with the service itself when it has been rendered. *The right to render labor or service is one thing; the service itself quite a different thing.* * * *

In Ritchie v. People, 155 Ill. 98, 40 N. E. 454, 29 L. R. A. 79, 46 Am. St. Rep. 315,

"the court held a statute of the state prohibiting the employment of females in any factory

for more than eight hours a day unconstitutional, on the ground that the right to labor and employ labor is a property right, of which the citizen cannot be deprived without due process of law.

The same was said in

Gillespie v. People, 188 Ill. 176, 58 N. E. 1007, 52 L. R. A. 283, 80 Am. St. Rep. 176:

"There a law making it criminal for an employer to attempt to prevent his employees from joining labor unions, or to discharge them because of their connection with labor unions, was held unconstitution, as being in controvention of the guaranty that no person shall be deprived of life, liberty or property without due process of law."

In this case we have a combination that imposes rules that are oppressive and calculated to and do restrain the freedom of the employee, just as the state statute restrains the freedom of the employer in the cases above cited; in those cases it was a statute, but we will show later on, that what a state cannot do an individual or combination of individuals cannot.

PLAINTIFF IS ENTITLED TO INJUNCTIVE RELIEF.

Plaintiff having a property right in his right to labor, an unauthorized restriction thereon is a taking of his property without due process of law, he being engaged in interstate and foreign com-

merce, his rights are given by Section 16 of the Act of October 15, 1914, which reads:

> "That any *person,* firm, corporation, *or association* shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, *against threatened loss* or damage by a violation of the anti-trust laws.

Clause Fifth of Section 24 of the Judiciary Act.

Gable v. Vobbegut Shoe Mach. Co., 274 Fed. 66 (syllabus):

> "Though under the Clayton Act, Sec. 16, 19 Comp. Statutes, etc., a private party may maintain a suit to enjoin acts interfering with interstate commerce the requirement being that the acts complained of must be immediately directed against interstate commerce."

Duplex v. Deering, 254 U. S. 443, 464.

> "The Clayton Act, in Sec. 1 includes the Sherman Act in a definition of anti-trust laws" and in Sec. 16 (38 Stat. 738) *gives to private parties a right to relief by injunction in any court of the United States against threatened loss or damage by a violation of the anti-trust laws* under the conditions and principle regulating the granting of such relief by courts of equity.

Atkins v. W. A. Fletcher Co., 65 N. J. Eq. 658, 666.

> "What a court of equity will protect by an injunction in a proper case are the rights of the two parties dually interested in the conflict W. A. Fletcher Company and their employes—the right of one to employ *and the right of the other to be employed; the right of both to*

have a free labor market where an opportunity to make a living depends.

Labatt on Master & Servant, 2nd Edition.

Section 2691.

"An injunction may be granted against threatened interference by unlawful means, with one's existing employment, *or against the commission of acts tending unlawfully to interfere with the obtaining of employment by complainant*, where there is reason to believe that continued interference is contemplated."

(c)

THE DEFENDANTS' COMBINATION IS UNLAWFUL.

Defendants are common carriers, and it is their duty to compete in all matters relating to the business, a man has as much right to go to sea in interstate and foreign commerce as another has to run a ship therein, one cannot engage in such business without the other, this court said in

The Passenger cases, 7 Howard 232, 407.

"The officers and crew of the vessel are as much the instruments of commerce as the ship, * * * they are taxed under this health law of New York as such instrument."

The Lottawanan, 21 Wallace 558, 577.

"The scope of the maritime law, and that of commercial regulation are not coterminous, it is true, but the latter embraces much the largest part of ground covered by the former. Under it Congress has regulated the registry, entol-

> ment, license, and nationality of ships and vessels; the method of recording bills of sale and mortgages thereon; *the rights and duties of seamen;* the limitations of the responsibility of shipowners for the negligence and misconduct of their captains and crews; and many other things of a character truly maritime * * * Ships or vessels of the United States are creatures of the legislation of Congress." * * *

Page 573:

> "Congress having created, as it were, this species of property and conferred upon it its chief value under the power given in the constitution to regulate commerce, we perceive no reason for entertaining any serious doubt but that this power may be extended to the security and protection of the rights and titles of all persons dealing therein."

The rights and duties of seamen are a matter for Congressional legislation alone, it has the exclusive power to pass regulations of interstate and foreign commerce. The powers given to Congress are found in Section 8 of Art. 1 of the Constitution, Clause 3 of that section reads:

> "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

It has been uniformly held that that power is exclusive, Congress has the right to legislate on matters relating to seamen,

The Troop, 117 Fed. 557;

Kenney v. Blake, 125 Id. 572.

And has done so in the matters involved herein in the Shipping Commissioners' Act, with its various amendments, that act was taken almost verbatim from the British Merchant Shipping Act, in which the duties of a Shipping Master are given to the Shipping Commissioner, and the law is as follows:

When first passed the matter of regulating the shipment and discharge of merchant seamen was vested in the Circuit Courts of the United States, its judges appointed the Shipping Commissioner, and Section 4501 of the Revised Statutes then read:

> "Such courts shall regulate the mode of conducting business in the shipping office to be established by the shipping commissioners as hereinafter provided; and shall have full and complete control over the same, subject to the provisions herein contained."

The matter was taken out of the hands of the Circuit Court in 1884 and given to the Secretary of the Treasury, then went from him to the Secretary of Commerce and Labor and from him to the Secretary of Commerce where it now is.

Section 4507 of the Revised Statutes now reads:

> "The Secretary of Commerce shall assign in public buildings or otherwise procure suitable offices and rooms for the *shipment and discharge of seamen,* to be known as the Shipping Commissioner's office, and shall procure furniture, stationery, printing and other requisites for the transaction of the business of such office."

The following sections shows that defendants are doing the very things Congress says the Shipping Commissioner shall do, to wit:

They have established an office for the supplying of seamen and there do what is provided for as follows; Section 4508 Revised Statutes reads:

> "The General duties of a shipping commissioner shall be;
>
> First. To afford facilities for engaging seamen by keeping a register of their names and characters.
>
> Second. To superintend their engagement and discharge, in manner prescribed by law.
>
> Third. To provide means for securing the presence on board at the proper times of men so engaged.
>
> Fourth. To facilitate the making of apprenticeships to the sea service.
>
> Fifth. To perform such other duties relating to merchant seamen or merchant ships as are now or may hereafter be required by law."

Section 4612 gives the form of contract a seaman must sign, which also sets forth the kinds and quantity of food he shall receive, and the following particulars are required to be thereon, to-wit;

The birthplace, age, height, complexion, color of hair, wages, allotment, etc.

Section 4551 of the Revised Statutes reads:

> "Upon the discharge of any seaman, or upon the payment of his wages, the master shall sign and give him a certificate of his discharge, specifying the period of his service and the time and place of his discharge, in the form

> marked Table B in the schedule attached to this Title; and every master who fails to sign and give to such seaman such certificate and discharge, shall, for each offense, incur a penalty not exceeding fifty dollars. But whenever the master shall discharge his crew or any part thereof in any collection district where no shipping commissioner has been appointed, he may perform for himself the duties of such commissioner."

The certificate of discharge is a part of Section 4612, and upon such certificate of discharge there is required to be the following matters to-wit:

> "Name and official number of ship, Port of Registry, Tonnage, Description of voyage or employment, Name of Seaman, Place of birth, Date of birth, Character, Declines to give statement of Character, Capacity, Date of entry, Date of discharge, Place of discharge."

To those matters which Congress has prescribed, defendants have added, date of birth, weight, the color of the eyes, his complexion, the total years of sea experience, his previous experience and employer, and the requirement that the photograph shall be attached thereto.

The Congressional scheme as to the discharge is that the Shipping Commissioner shall give the seaman a discharge, which of course the master of another vessel that the seaman seeks employment on may demand inspection of, the scheme of employment and discharge is complete.

However, defendants are undertaking to supply all of the seamen employed in interstate and foreign commerce on the Pacific Coast, in direct violation of the provisions of the Revised Statutes and they are subject to the penalties of the following sections of the Revised Statutes in so doing, to-wit:

> 4514. "If any person shall be carried to sea, as one of the crew on board any vessel making a voyage as hereinbefore specified, without entering into an agreement with the master of said vessel, in the form and manner, and at the place and time in such cases required, the vessel shall be held liable for each such offense to a penalty of not more than two hundred dollars." * * *
>
> 4515. "If any master, mate, or other officer of a vessel knowingly receives, or accepts, to be entered on board of any merchant vessel any seaman who has been *engaged or supplied* contrary to the provisions of this Title, the vessel on board of which such seaman shall be found, shall, for every such seaman, be liable to a penalty of not more than two hundred dollars."

These two sections make the supplying of seamen by the Shipping Commissioner *exclusive,* the language is as clear as it is possible to make it.

In

Loewe v. Lawlor, 208 U. S. 303-4,

this court said:

> "It is curious to note the fact that in a large proportion of the cases in respect to interstate commerce brought to this court the question presented was of the validity of state legislation in its bearings upon interstate commerce,

and the uniform course of decision has been to declare that it is not within the competency of a state to legislate in such a manner as to obstruct interstate commerce. *If a State,* with its recognized powers of sovereignty, is impotent to obstruct interstate commerce, *can it be that any mere voluntary association of individuals within the limits of that State has a power which the State itself does not possess.*"

In

Thomsen v. Cayser, 243 U. S. 66,

this court says on page 85:

"The defendants were common carriers and the defendants were common carriers and it was their duty *to compete, not combine;* and their duty takes from them palliation, subjects them in a special sense to the policy of the law."

On page 87:

"And it is established that the conduct of property embarked in the public service is subject to the policy of the law."

That was a steamship case where steamship companies had combined to fix freight rates.

In the case of Wilson v. New, 243 U. S. 332, in which case the Adamson Law, regulating wages, overtime, hours of labor, etc., on railroads came before the Supreme Court, the court speaking of the powers of Congress on such subjects says on page 349:

"Equally certain is that the power has been exercised so as to deal not only with the carrier, but with its servants and to regulate the rela-

tion of such servants not only with their employers but between themselves." * * *

Page 364. Concurring opinion of Justice McKenna.

> "I speak only of intention; of the power I have no doubt. When one enters into interstate commerce one enters into a service in which the public has an interest and subjects one's self to its behests. And this is no limitation of liberty; it is the consequence of liberty exercised, the obligation of his undertaking, and constrains no more than any contract constrains. The obligation of a contract is the law under which it is made and submission to regulation is the condition which attaches to one who enters into or accepts employment in a business in which the public has an interest."

Plaintiff and those on whose behalf he sues have chosen the sea as a calling, other men have established ship-chandleries where ship outfits are sold, others operate tug boats to move vessels around, others have groceries and butcher shops that sell to none but vessels. Suppose these same defendants should establish a rule that each of the foregoing must register their names in their office and take their turn for a sale of goods or for the use of a tow-boat, that would be held a restraint on their right to do business; or supposing they should combine and tell all shippers they must register their names and take their turn as to vessels without any choice as to the vessel, that would be held to be a restraint.

The same rule must apply to persons, without whom vessels cannot operate at all, their crews, if the whole of the employers in a line of business can combine and make regulations to suit themselves, all can do it, and it would only be a question of time when all persons who work for others would be reduced to a condition of peonage.

Appellees in this case can not complain about the regulations established by Congress.

In the case of Patterson v. Bark Eudora, 190 U. S. 169, the section prohibiting the payment of advance wages to seamen on foreign vessels, when such seamen were shipped in the United States, came before the court and the question of the invasion of the liberty of contract was raised, just as defendants raise it in this case, and we respectfully quote the following language from that decision:

> 173. "But the main contention is that the statute is beyond the power of Congress to enact, especially as applicable to foreign vessels. It is which is guaranteed by the Fourteenth Amendurged that it invades the liberty of contract ment to the Federal Constitution, and reference is made to Allgeyer v. Louisiana, 165 U. S. 578, 589, in which we said:
>
> '* * * that the regulation of commerce does not carry with it the power of controlling contracts of employment in such service, any more than it includes the power to regulate contracts of service on interstate railroads, etc. * * *'

We are unable to yield our assent to this contention. That there is, generally speaking, a liberty of contract which is protected by the Fourteenth Amendment, may be conceded, yet such liberty does not extend to all contracts. As is said in Frisbie v. United States, 157 U. S. 160, 165:

'While it may be conceded that, generally speaking, among the inalienable rights of the citizens is that of liberty of contract, yet such is not absolute and universal. It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. It may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor the right to assume any obligations, except for the necessaries of existence; to the common carrier the power to make any contract releasing himself from negligence, and, indeed, may restrain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services, or property.'

And that the contract of a sailor for his services is subject to some restrictions was settled in Robertson v. Baldwin, 165 U. S. 275, in which Sections 4598 and 4599, Rev. Stat., in so far as they require seamen to carry out the contracts contained in their shipping articles, were held not to be in conflict with the Thirteenth Amendment, and in which a deprivation of personal liberty not warranted in respect to other employees was sustained as to sailors. We quote the following from the opinion (p. 282):

'From the earliest historical period the contract of the sailor has been treated as an exceptional one, and involving, to certain extent, the surrender of his personal liberty during the life of the contract. Indeed, the business of navigation could scarcely be carried on without some guaranty, beyond the ordinary civil remedies of contract, that the sailor will not desert the ship at a critical moment, or leave her at some place where seamen are impossible to be obtained—as Molloy forcibly expresses it, "to rot in her neglected brine". Such desertion might involve a long delay of the vessel while the master is seeking another crew, an abandonment of the voyage, and, in some cases, the safety of the ship itself. Hence, the laws of nearly all maritime nations have made provisions for securing the personal attendance of the crew on board, and for their criminal punishment for desertion, or absence without leave during the life of the shipping articles.'

'If the necessities of the public justify the enforcement of a sailor's contract by exceptional means, justice requires that the rights of the sailor be in like manner protected. The story of the wrongs done to sailors in the larger ports, not merely of this nation but of the world, is an oft-told tale, and many have been the efforts to protect them against such wrongs. One of the most common means of doing these wrongs is the advancement of wages. Bad men lure them into haunts of vice, advance a little money to continue their dissipation, and, having thus acquired a partial control and by liquor dulled their faculties, place them on board the vessel just ready to sail and most ready to return the advances. When once on shipboard and the ship at sea the sailor is powerless and no relief is availing. It was in

order to stop this evil, to protect the sailor, and not to restrict him of his liberty, that this statute was passed. And while in some cases it may operate harshly, no one can doubt that the best interests of seamen as a class are preserved by such legislation.

Neither do we think there is any trespass on the rights of the States. No question is before us as to the applicability of the statute to contracts of sailors for services wholly within the State.'

Contracts with sailors for their services are, as we have seen, exceptional in their character, and may be subjected to special restrictions for the purpose of securing the *full and safe* carrying on of commerce on the water. Being so subject, whenever the contract is for employment in commerce, not wholly within the State, legislation enforcing such restrictions comes within the domain of Congress, which is charged with the duty of protecting foreign and interstate commerce."

PLAINTIFF HAS A RIGHT TO BRING A CLASS SUIT.

Equity Rule 38;

Beatty v. Kurtz, 2 Peters 563, 583-4;

Callon v. Hope, 75 Fed. 758;

Duplex v. Deering, 254 U. S. 443;

Gieske v. Anderson, 77 Cal. 247;

Wheelock v. First Presbyterian Church, 119 Id. 477;

Florence v. Helms, 136 Id. 613.

THE EFFECT OF THE RULES AND REGULATIONS OF APPELLEE'S.

The taking of turns for employment, that is only obtaining employment by number, is destructive of competition not only as to the employee but also as to the employer, neither has any right of selection, and would eventually lessen the standard of efficiency, as an inefficient workman would stand just as much chance of employment as a skilled one, and there would be no incentive to acquire skill.

The rules again say that no employment would be obtained by any one who failed to obey them; that is in effect a blacklist.

In the case of

Gompers v. Bucks Stove & Range Company, 221 U. S. 418,

this court says:

> "In Loewe v. Lawlor, 208 U. S. 274, the statute was held to apply to any unlawful combination resulting in restrain of interstate commerce. In that case the damages sued for were occasioned by acts which among other things, did include the circulation of advertisements. But the principle advanced by the Court was general. It covered any illegal means by which interstate commerce is restrained, *whether by unlawful combinations of capital, or unlawful combinations of labor;* and we think also whether the restraint be occasioned *by* unlawful contracts, trusts, pooling arrangements, *blacklists,* boycotts, *coercion, threats, intimidations* and whether they be made effective, in whole or in part, by acts, words or printed matter."

The above being quoted from In re Debs, 158 U. S. 564.

That the continuous discharge system can be used and has been used for blacklisting purposes is best evidenced by the fact that the Lake Carriers' Association had a similar system, a report on which is to be found in Pamphlet Whole Number 235, issued by the U. S. Department of Labor Bureau Statistics in 1918, under the title "Employment System of the Lake Carriers' Association". An investigation of the system was ordered by the Bureau and the conclusions of the investigator were as follows, pages 31 and 32 of said report and pamphlet:

> "This evidence of the continuing dissatisfaction of the sailors with their jobs on the Lakes, in addition to the evidence herewith submitted showing the existence of a system of practically compulsory registration and continuous-service records which actually operate as a black list, at the best, holds threats of the black list over the seamen, indicates pretty clearly that there is something radically wrong with the present system of labor employment on the Lakes. Many seamen are bitterly antagonistic to this 'welfare-plan' shipping system. This opposition is partly due to the fact that, apart from its merits or demerits, they feel that it is a system imposed upon them—a plan in the operation of which they have no part. They consider it undemocratic and feel that it seriously infringes upon their freedom of action and upon their right to organize among themselves for the betterment of the conditions under which they work."

Matters became so serious on the Lakes owing to the discharge book system which was practically about the same as the book in this case as shown by the report, excepting that on the Lakes, the carriers always denied that seamen were compelled to go to their offices to get work, and in this case the appellees flatly say in effect he must go there or he cannot get work, and the complaint alleges he must go there, that finally the United States Shipping Board appointed ex-Governor Bass of New Hampshire to investigate, and upon the coming in of his investigation, and decided as follows, page 33 of Report:

> "Upon all the evidence received this board has decided that the discharge book is undesirable and should be abolished. It is believed, however, that certain features of the discharge book system are of value both to management of the shipping industry and to the men."

There is some evidence, or statement in the report that it was decided to continue it under government supervision. However, the law provides for the same thing in the certificate of discharge.

In the Report of the United States Shipping Board on Work, Wages and Industrial Relations during the Period of the War, issued in 1919, we find the following on page 24:

> "After an investigation carried out in accordance with this promise the Shipping Board announced on November 21, 1917, that what had been known as the continuous discharge book should be abolished. In its place individual certificates of discharge might still be issued;

but only special data could be given as would describe the seaman and the nature of his service, thereby eliminating the objectionable 'personal opinion' feature, or any other notation that might indicate a seaman's union activities. By this regulation it was hoped that the good features of the Lake Carriers' Welfare Plan might be saved, but that the possible use of its records as a 'blacklisting device' might be prevented. * * *

With the opening of Lake navigation in the spring of 1918, it was found that the labor issues in that section were assuming a much more serious form. The Shipping Board was informed that the Lake Carriers' Association has substituted for the discharge book a 'certificate of membership', with a pocket in it, as a container for the individual discharge certificates, and that all the papers had as before to be produced and deposited at the time of employment. It was believed by the men that the new device could be made to serve exactly the same purpose as the old."

Page 26:

"In an effort to ease this tense situation the Shipping Board had already taken up the discharge system, and during the months of June and July suggested and then directed that the discharge certificate should not be in book form or accompanied by a container, and that it should state on its face that it was the property of the man to whom it was issued. Nor was the holder of the certificate to be required to deposit it or produce it at the time of hiring. It was declared to be 'the intent of this finding that seamen should be employed solely with reference to their fitness for the work and not with reference to membership in the Welfare Plan, nor with reference to affiliation with or activity in any union'."

We have already called the court's attention to the fact, that the Shipping Commissioners' Act is copied from the British Merchant Shipping Act, the certificate of discharge is the discharge that has been used and under which the enormous British merchant fleet has been built up and operates, any innovations would seem to be clearly unnecessary, and the innovation in this case is a clear blacklisting scheme, and is unlawful as it restrains both the seaman from freely engaging in interstate and foreign commerce, and also the individual operator of a vessel who is a member of either of appellee organizations.

The language of appellees is:

> "and no person will be employed by these associations unless he is registered at their employment offices and has in his possession this Certificate and Discharge."

There is coercion, threats and intimidation in that language within the inhibition this court has laid down in Gompers v. Bucks Stove and Range Company, above cited.

That the combination complained of herein is a combination in restraint of one of the instrumentalities of interstate and foreign commerce to freely engage therein cannot be questioned.

And no good reason can be shown, why such instrumentality is not entitled to injunctive relief. Section 16 of the Clayton Act says "any person" may obtain such relief. To hold otherwise would be to put the rights of property above the rights of the man.

Supposing a seaman should accumulate sufficient in his calling to acquire a vessel and such vessel was restrained as the seamen are here, can it be possible that in the transition of the fruits of his labor over into a piece of observable property rights attached to it that were not possessed while he was acquiring it? That a piece of property has a right superior to the individual? The right of both *acquiring* and *enjoying* property are generally conceded to be equal rights before the law.

EFFECT OF THE SHIPPING COMMISSIONERS' ACT.

There is nothing in the Shipping Commissioners' Act that compels any shipowner or master of a vessel to take any seaman the Shipping Commissioner may designate, it is simply a public employment office established to facilitate the operation of vessels, where a shipmaster can go to look over the register of names and pick out those he may want, and find a crew where otherwise he might not be able to find one. England has built up her enormous merchant marine under the system, and again, the scheme is to protect the seaman within the principles explained in Patterson v. The Bark Eudora, heretofore cited.

DECISION OF THE LOWER COURT.

The learned judge of the lower court says in his decision:

> "So far as I am advised, this suit is without precedent."

We submit that the foregoing pages show it is not, but if it were that would be no ground for denying relief, there is not a single legal precedent now existing, that was not originally without judicial precedent, the law is considered a progressive science, and equity was established to furnish remedies where none before existed, if lack of precedent was a sufficient ground for denying relief, the progress of the law would be at a stand-still.

A combination in restraint of interstate and foreign commerce is shown herein, and Congress gave private parties the right to obtain injunctive relief in Section 16 of the Clayton Act which we will again call the court's attention to verbatim.

> "That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws."

Plaintiff is not only threatened with loss, but is suffering loss by the illegal combination complained of herein, but others have left their calling on account of the combination, necessarily suffering loss. There is a positive statutory right to maintain this action, and it is not necessary to "formulate any theory on which the complaint can be sustained".

As to the Shipping Commissioners' Act, the learned lower court was in error when it used the following language with respect to the services of the Shipping Commissioners, to-wit:

"But their service in that respect is not exclusive."

We again call this court's attention to Sections 4514 and 4515 of the Revised Statutes, the latter reading:

"If any master, mate, or other officer of a vessel knowingly receives, or accepts, to be entered on board of any merchant vessel, any seaman who has been *engaged or supplied* contrary to the provisions of this Title, the vessel on board of which such seaman shall be found shall, for every such seaman, be liable to a penalty of not more than two hundred dollars."

We respectfully submit that the matters appellees do with relation to the engaging and supplying of seamen are exclusive to the Shipping Commissioner.

The learned lower court was again in error when it used the following language:

"Such bureau may be maintained by either seamen or employers independently and may render material assistance without impinging upon the letter or the spirit of the statutes."

Sections 4514-15 of the Revised Statutes are penal in their character and no one has a right to violate a penal statute, particularly by making regulations of interstate and foreign commerce which even a State could not do, the exclusive power of making such regulations is vested in Congress.

The learned lower court also said:

"Besides, the plaintiff is not shown to have any standing entitling him to seek in court the general relief for which he prays. He is not

in a position to vindicate general governmental policies, nor is 'the agency to establish the public welfare.' "

A part of the governmental policy of this Nation is to prohibit combinations in restraint of interstate and foreign commerce. That an individual may sue to vindicate a violation of that general government policy, and establish the public welfare in that behalf, Congress has said in Sec. 16 of the Clayton Act, and all the courts have sustained that right in every case brought before them under that section.

If the learned lower court was right, Section 16 of the Clayton Act is non-effective, it was passed to give private persons the right to injunctive relief, and to remedy the defect that existed in the laws prior to its passage, as at that time none but the United States could sue.

Again, if what the learned lower court says is the law, what would become of the countless injunction suits that employers obtain to restrain violence on the part of striking employees? The public welfare is affected by assaults and batteries, breaches of the peace are matters of concern to every resident of a community, the whole public welfare is affected by them, and it has never been claimed or held that that was a reason for denying injunctive relief.

As to the closing portion of the decision of the lower court, we respectfully submit: That the law never requires idle acts, the decisions, and statute law, without exception establish the principle that

no man is required to make a tender, when he is told in advance that his tender will avail him nothing and will not be accepted.

As a prerequisite to obtaining employment, before he can go to the Shipping Commissioner at all, a seaman is told by the complained of combination in this case, as follows:

> "and no person will be employed by these associations unless he is registered at their employment offices and has in his possession this Certificate and Discharge."

Of what avail would an offer of service be in this case? The seaman is absolutely foreclosed in advance and no tender would be of any avail. The only thing he can do is to go and obey the unlawful regulations complained of and pay the sum of 25¢, a tax on his privilege of earning a living in interstate and foreign commerce.

We respectfully submit that the decision of the lower court was erroneous herein and pray that this court will direct the Second Division of the District Court for the Northern District of California, Southern Division, to deny defendants' motion to dismiss plaintiff's complaint and proceed as this court may direct.

Dated, San Francisco,
February 24, 1923.

H. W. HUTTON,
Attorney for Appellant.

FILED
OCT 27 1923
WM. R. STANSBU
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In the Supreme Court
OF THE
United States

IN EQUITY

OCTOBER TERM, 1923

No. 156

ALFRED STREET, suing on behalf of himself and all other seamen engaged in interstate and foreign commerce by sea on vessels flying the flag of and engaged in the merchant service of the United State of America and sailing to and from ports on the Pacific Coast of the United States of America,

Appellant,

vs.

SHIPOWNERS' ASSOCIATION OF THE PACIFIC COAST and PACIFIC AMERICAN STEAMSHIP ASSOCIATION,

Appellees.

APPELLANT'S REPLY BRIEF AND BRIEF ON APPELLEES' MOTION TO DISMISS.

H. W. HUTTON,
Pacific Building, San Francisco,
Attorney for Appellant.

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APPELLANT'S REPLY BRIEF AND BRIEF ON APPELLEES' MOTION TO DISMISS.

I.

THERE IS NO STATEMENT OF FACTS IN THE BRIEF ON MOTION TO DISMISS.

We submit that the following language on page 6 of appellees' brief, to-wit:

> "For the purposes of this argument all of the facts properly pleaded in the complaint will be taken to be admitted, and the statement of facts in this case is accordingly the complaint itself."

Is not a compliance with Section 1 of Rule 6 of this court, which reads:

> "1. All motions to the Court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion."

For the reason that counsel for appellees may be of the opinion that none of the facts are properly pleaded, if they are not of such opinion, it is their duty to point out to the court and to counsel for appellant exactly what facts they rely on, and not leave the matter to research by the court and opposing counsel.

II.

THE QUESTION OF THE JURISDICTION OF THE LOWER COURT IS NOT INVOLVED HEREIN.

No question of the jurisdiction of the lower court appears in any of appellant's papers, and it is difficult to see how such could appear. He selected his own tribunal. The decision was adverse on the

merits. If the decision had been the other way, under some circumstances it might have been open to the other side to have raised the question, but we fail to see how appellant can under the circumstances of this case.

III.

THIS APPEAL DOES INVOLVE THE CONSTRUCTION AND APPLICATION OF THE CONSTITUTION OF THE UNITED STATES.

The following facts appear herein, to-wit: Appellees, either own, operate or control all of the vessels engaged in interstate and foreign commerce sailing to and from the Pacific Coast of the United States, such vessels are one of the instrumentalities of such commerce, the crews without which the vessels cannot operate are the other instrumentality, and combined they are engaged in a public service. The commerce clause in the constitution gives Congress the exclusive right to regulate the method of selection, engagement, discharge and all other things relating to the employment of seamen on such vessels and it has done so, it follows that if any other authority undertakes to regulate such matters, such regulation is an unconstitutional obstruction, hindrance and restraint on the commerce itself.

Appellees claim such power vested in Congress are not exclusive, but under such commerce clause Congress has fixed a scale of food, the size of forecastle space, when and how a seaman shall be paid, and in fact about everything relating to the sea-

men's calling, except the rate of wages to be paid, it seems idle to claim that when Congress has passed such laws, which are of necessity regulations of commerce, that any other body can disregard such matters and set up laws of their own.

Appellant is a seaman, and has been engaged in the above commerce for years, and alleges he wishes to continue in it, appellees however have set up a continuing refusal to employ him unless he conforms to the rules and regulations they have prescribed, as appears by the language of appellees themselves alleged in (Trans. fol. 4) as follows;

> "and no person will be employed by these associations unless he is registered at their employment office and has in his possession this Certificate of Discharge".

Applying for employment under such circumstances would be an idle act, appellant alleges (Trans. fol. 5) that he refuses to work under such regulations as follows;

> "and plaintiff refuses to engage in such commerce thereunder and is suffering loss and damage because he cannot obtain employment without obeying such rules and regulations, and defendants threaten to and will continue to enforce such rules and regulations unless restrained by this Honorable Court".

The following is found on page 4 of appellees brief,

> "Of course, a person has a right to a free opportunity to contact for employment, but nothing short of a black-list system, maliciously

> used, or some other malicious combination is a violation of that right."

The right of an individual to a free market for his labor is conceded in that language, but counsel's definition of what constitutes a violation of that right is not in harmony with the decisions of this court, and we take the liberty of again calling the court's attention to the following, a part of the language quoted from Gompers v. Buck's Stove & Range Company, 221 U. S. 418, found on page 34 of appellant's brief, to-wit:

> "But the principle advanced by the Court was general. It covered any illegal means by which interstate commerce is restrained, whether by *unlawful combinations of capital*, or unlawful combinations of labor; and we think also whether the restraints be occasioned by *unlawful contracts, trusts, pooling arrangements, blacklists, boycotts, coercion, threats, intimidations and whether they be made effective, in whole or in part, by acts, words or printed matter.*"

Under that language the presence or absence of malice is immaterial, and in addition to black-list this court has designated unlawful contracts, trusts, pooling arrangements, boycotts, coercion, threats, intimidations, each of which are present in this case.

Any interference with the right of a free market for labor or the carrying on of a business has always been denounced by the courts as an invasion of a person's constitutional rights, and on that point we call the court's attention to the authorities cited on pages 9 to 20, inclusive, of our brief herein.

The following language on page 24 of appellees' brief herein is not a complete or fair statement of what is involved herein, to-wit:

> "Interstate or foreign commerce, within the meaning of the decisions, consists of transactions carried on *after the employment* by the employer, and unless such commerce is directly affected there is no 'regulation' of commerce."

We have the following facts in this case that are carried on *after the employment,* to-wit:

An employee has to pay a fee for a discharge book, which is a tax on interstate and foreign commerce and his right to engage therein. He must deliver the book to the master of the vessel on which he is employed. The latter must make entries therein and re-deliver the discharge book to the seaman when that employment is terminated, who must present it before he can be re-employed. The rules and regulations thus commence with the initial selection of the man and continue as long as he is engaged in the business, *and in addition to the above he must take his turn for employment.*

The right of a seaman to freely engage in interstate and foreign commerce is thus trespassed upon, and it seems idle for appellees to claim that such matters are trivial, when 10,000 seamen and the whole of the interstate and foreign commerce of the Pacific Coast of the United States on American merchant vessels is affected.

But the first supplying of seamen is within the commerce clause of the Constitution. Counsel say it is not, but this court has said that it is in

Patterson v. Bark Eudora, 190 U. S. 169.

Syllabus:

> "Contracts for seamen's wages are exceptional in character and may be subjected to special restrictions, and whenever they relate to commerce not wholly within a state, legislation enforcing such restrictions comes within the domain of Congress under the commerce clause of the constitution, and such legislation is not contrary to the Fourteenth or Thirteenth Amendments."

Of course such matters are within the exclusive domain of the Congress, but counsel for appellees claim that what a political community of the United States cannot do, an association of individuals can do, and so claim in the light of what they had before them on pages 27 and 28 of our brief herein, to-wit, the quotation of this court's language on the same subject in the case of Loewe v. Lawlor, 208 U. S. 303-4:

> "It is curious to note the fact that in a large proportion of the cases in respect to interstate commerce brought in this court the question presented was of the validity of state legislation in its bearings upon interstate commerce and the uniform course of decision has been to declare that it is not within the competency of a state to legislate in such a manner as to obstruct interstate commerce. If a state, with its recognized powers of sovereignty, is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals

within the limits of that state has a power which the state itself does not possess?"

There is not a thing connected with the business appellees are engaged in that is not subject to regulation by Congress; the thickness of the boilers of its vessels, the structural strength of their vessels, the amount of steam they can carry, the number of boats, size of their crews, the register of the vessels in the custom house, the yearly inspection, the licensing of its officers, the ordering of repairs when necessary; in fact, a vessel cannot run at all unless she is fully within the rules prescribed by Congress under the commerce clause of the Constitution. The regulations relating to the supply, engaging and discharge of their crews are all subject to the same regulation by Congress under the same commerce clause of the Constitution, and the decisions all hold that it is under that clause that Congress obtains its power. If there is a trenching on that power by an unauthorized authority, necessarily the question of the application of the commerce clause of the Constitution is involved, and all we have to the contrary is the bare statement of counsel in their brief that it is not involved.

Again, as we have said, it has been uniformly held, that when there is an invasion or interference with the right to carry on business, the constitutional rights of the person so interfered with is involved. Hence the application of the Constitution is involved in this case.

The vessels of appellees are engaged in a public service, and are bound to keep within the policy of the law.

IV.

THERE IS NO DIFFERENCE BETWEEN THE DUTIES OF THE SHIPPING COMMISSIONER AND A BRITISH SHIPPING MASTER.

When the British Merchant Shipping Act was made the law of this country, Congress simply substituted a Shipping Commissioner, appointed at first by the Circuit Court and now by the Secretary of Commerce, for the British Shipping Master, appointed by the Board of Trade.

The following are the particular sections of the law on the subject:

R. S. Sec. 4501:

> "The Secretary of Commerce shall appoint a commissioner for each port of entry, which is also a port of ocean navigation, and which, in his judgment, may require the same; such commissioner to be termed a shipping commissioner, and may from time to time, remove from office any such commissioner whom he may have reason to believe does not properly perform his duty. * * *"

British Merchant Shipping Act:

> "146. The Board of Trade may grant to such persons as it thinks fit licenses to engage or supply seamen or apprentices for merchant ships in the United Kingdom, to continue for

such periods, to be upon such terms and to be revocable upon such conditions as such board thinks proper."

R. S. Sec. 4504:

"Any person other than a commissioner under this Title who shall perform or attempt to perform, either directly or indirectly, the duties which are by this Title set forth as pertaining to a shipping commissioner, shall be liable to a penalty of not more than five hundred dollars. * * *"

British Merchant Shipping Act, Sec. 147:

"(1) If any person not licensed as aforesaid, other than the owner or master or mate of the ship or some person who is bona fide the servant and in the constant employ of the owner, or a Shipping Master duly appointed as aforesaid, engages or supplies any seaman or apprentice to be entered on board any ship in the United Kingdom, he shall for each seaman or apprentice so engaged or supplied, incur a penalty not exceeding twenty pounds."

The privileges of the owner under our law are by the latter part of R. S. Section 4504 limited to trade between the United States and the British North American Possessions, or the West India Islands, or the Republic of Mexico.

What Congress intended to do is very clear, it turned the whole matter of the supplying, engaging and discharge of seamen over to the Shipping Commissioner, defined his duties in Section 4508 of the Revised Statutes, and then enacted Sub. (3) of Section 147 of the British Merchant Shipping Act as

Section 4515 of the Revised Statutes, imposing a penalty of two hundred dollars for the receipt of each seaman on board contrary to the provisions of the Shipping Commissioners Act.

The case of the Grace Lothrop, cited by appellees, is not in point. The question in that case was whether the voyage in question was within the Shipping Commissioners Act at all, and it was held it was not. The following case seems to have been decided directly to the contrary though:

U. S. v. Steamship City of Mexico, 1 Central Law Journal 191.

We respectfully submit that appellees are obtaining their men in violation of law and are subject to a penalty of two hundred dollars for each man they obtain through the medium of their office. And again we submit, that when Congress defines a way that a thing shall be done, that no argument is necessary to show that the way so defined is the *exclusive* way, and the application of at least the commerce clause of the Constitution is involved herein.

V.

APPELLANT HAS A RIGHT TO INJUNCTIVE RELIEF HEREIN.

We respectfully call the court's attention to Sec. 16 of the Clayton Act, and the authorities we cite on pages 20, 21 and 22 of our brief on this point.

The Debs case, 158 U. S. 564, cited on page 25 of appellees' brief, was prior to the passage of the Clayton Act, and all

U. S. v. Ry. Employers Dept., A. F. L., 283 Fed. 479,

also cited as above, decides is that the United States under its general equity jurisdiction may bring such a suit, but it says nothing whatever on the right of others to do so under the Clayton Act.

As to the following cases cited in appellees brief all this court held in Adair v. U. S., 208 U. S. 161 was, that Congress had no power to pass the law involved in that case, on the contrary, it has been uniformly held that Congress has the right to pass the laws relating to seamen, and that it is the duty of the courts to enforce them

Patterson v. Bark Eudora, 190 U. S. 169, 179.

> "We are of the opinion that it is within the power of Congress to protect all sailors shipping in our ports on vessels engaged in foreign or interstate commerce, whether they belong to citizens of this country or of a foreign nation, *and that our courts are bound to enforce those provisions in respect to foreign equally with domestic vessels.*"

In the case of

McCabe v. A. T. & S. F. R. Co., 235 U. S. 159.

It appears that a law of Oklahoma had been passed imposing burdens on colored people who wished to ride on railroad trains, some volunteers commenced the above action before the law went

into effect, and there was not a thing in the case that indicated that any of the plaintiffs would have ever been affected by the law.

The same thing appears in

Stearns v. Wood, 236 U. S. 75,

this Court finding that Stearns was not affected by the law.

The case of

Handley v. Louisville & N. R. Co., 105 Ky. 162,

was decided upon the following language 167,

> "The averments that he had been deprived of the 'right' to again engage in the employment of other railroad companies and that the alleged wrongful act had made it impossible for him to again get employment with other railroad companies, *are mere conclusions of the pleader from the facts alleged.*"

There is nothing in that case that shows any railroad company had ever said it would not employ plaintiff, we have the positive statement of what appellees say in this case.

VI.

SEAMEN ARE AS MUCH AN INSTRUMENT OF COMMERCE AS THE VESSELS. IF THEY ARE HINDERED IN THEIR EFFORTS TO ENGAGE IN INTERSTATE AND FOREIGN COMMERCE, THEY HAVE A COMPLAINT.

United Mine Workers et al. v. Coronado Coal Co., 258 U. S. 570.

"It is clear * * * that, if Congress deems certain recurring practices, though not

> really part of interstate commerce, likely to obstruct, restrain or burden it, it has the power to punish conspiracies, in which such practices are part of the plan to hinder, restrain, or monopolize interstate commerce, but in the latter case the intent to injure, obstruct, or restrain interstate commerce must appear as an obvious consequence of what is to be done, or be shown by direct evidence or other circumstances."

It would seem that when Congress has determined the manner in which a thing shall be done, and has affixed penalties as it has in Sections 4514-4515 of the Revised Statutes in the matter of the initial selection of seamen, and has provided for their discharge and a certificate thereof and has provided penalties for a violation thereof as it has in Sections 4549, 4550, 4551 and 4553, that any other mode of performing the same matters must be a restraint burden and obstruction upon the freedom of those engaged in the business.

For the reasons stated herein, and also the reasons stated in our briefs herein, we respectfully ask that the motion to dismiss the appeal herein be denied, and that appellant have the relief prayed for in his brief herein.

Dated, San Francisco,
October 15, 1923.

Respectfully submitted,

H. W. HUTTON,
Attorney for Appellant.

In the Supreme Court
OF THE
United States

Office Supreme Court, U. S.
FILED
OCT 4 1923
WM. R. STANSBURY
CLERK

OCTOBER TERM, 1923

No. 156

ALFRED STREET, suing on behalf of himself and all other seamen engaged in interstate and foreign commerce by sea on vessels flying the flag of and engaged in the merchant service of the United States of America and sailing to and from ports on the Pacific Coast of the United States of America,

Appellant,

vs.

SHIPOWNERS' ASSOCIATION OF THE PACIFIC COAST AND PACIFIC AMERICAN STEAMSHIP ASSOCIATION,

Appellees.

} In Equity

NOTICE OF MOTION, MOTION, AND BRIEF IN SUPPORT THEREOF.

W. F. SULLIVAN,
Counsel for Appellee,
Shipowners' Association of the Pacific Coast.
EDWARD J. MCCUTCHEN,
J. M. MANTON, JR.,
A. CRAWFORD GREENE,
Counsel for Appellee,
Pacific American Steamship Association.

Subject Index

Page

Notice of motion 1

Motion to dismiss or affirm..... 3

Brief for appellees 5

Argument on motion to dismiss..... 6

I. This appeal is not "a case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified * * * "..... 7

II. This appeal is not "a case that involves the construction or application of the Constitution of the United States" 10

A. The claim that the acts complained of violate the commerce clause of the Constitution is unsubstantial and frivolous 11

(1) Congress has not regulated the preliminary engagement of seamen 12

(2) Appellees' acts of employment whether consistent or inconsistent with the provisions of the Shipping Commissioners Act, are not an interference with interstate commerce 22

(a) They do not directly affect commerce. 22

(b) Appellees' acts, as distinguished from state action, can under no circumstances constitute an interference with interstate commerce 24

B. The claims that the acts complained of deprive appellant of life, liberty or property without due process of law or deprive him of the equal protection of the laws or deprive him of the privileges and immunities of citizenship guaranteed by the Constitution, are all unsubstantial and frivolous 28

Page

III. This appeal is not a "case in which the constitutionality of any law of the United States" is drawn in question; nor is it any one of the other cases specified in Section 238 of the Judicial Code in which direct appeal to the Supreme Court may be had 32

IV. This appeal does not lie under the anti-trust laws because the United States is not party-plaintiff.. 33

Summary of argument on motion to dismiss..... 33

Argument for motion to affirm and for affirmance on appeal 34

I. The bill of complaint states no cause of action because it shows no connection between the acts of appellees and appellant, to the injury of appellant.. 35

II. This is not a proper class suit..... 41

III. Appellant has established no case under the anti-trust laws and no case of illegal conspiracy..... 44

IV. Appellant has established no other case for equitable relief 52

Summary 53

Table of Cases Cited

Pages

Adair v. U. S., 208 U. S. 161, 52 L. Ed. 436.....23, 45
Adams Express Co. v. Croninger, 226 U. S. 491, 57 L. Ed. 314 26
Addyston Pipe & Steel Co. v. U. S., 175 U. S. 211, 44 L. Ed. 136 45
Aikens v. Wisconsin, 195 U. S. 194, 49 L. Ed. 154..... 49
Allis-Chalmers Co. v. Iron Moulders Union No. 125, 150 Fed. 155 49
Anderson v. U. S., 171 U. S. 604, 43 L. Ed. 300..... 44
Apapas v. U. S., 233 U. S. 587, 58 L. Ed. 1104..... 9
Arkansas v. Schlierholz, 179 U. S. 598, 45 L. Ed. 335.... 9

Barney v. New York, 193 U. S. 430, 48 L. Ed. 737..... 30
Barrington v. Missouri, 205 U. S. 483, 51 L. Ed. 890.... 29
Barron v. Baltimore, 7 Pet. 243, 8 L. Ed. 672..... 29
Bayonne, The, 159 U. S. 687, 40 L. Ed. 306..... 9
Berkman v. U. S., 250 U. S. 114, 63 L. Ed. 877..... 10
Bien v. Robinson, 208 U. S. 423, 52 L. Ed. 556..... 7
Blumenstock Bros. Ad. Agency v. Curtis Pub. Co., 252 U. S. 436, 64 L. Ed. 649..... 45
Brazee v. Michigan, 241 U. S. 340, 60 L. Ed. 1034..... 24
Brolan v. U. S., 236 U. S. 216, 59 L. Ed. 544..... 11
Brown v. Jacobs Pharmacy Co., 115 Ga. 429, 41 S. E. 553 49
Brown v. New Jersey, 175 U. S. 172, 44 L. Ed. 119.... 29

Chappell v. U. S., 160 U. S. 499, 40 L. Ed. 510..... 9
Cincinnati, etc. R. Co. v. Rankin, 241 U. S. 319, 60 L. Ed. 1022 26
Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 50 L. Ed. 428..... 45
Civil Rights Cases, 109 U. S. 3, 27 L. Ed. 835..... 30
Cornellier v. Haverhill Shoe Mfrs. Assoc., 221 Mass. 554, 109 N. E. 643.....49, 50
Cosmopolitan Min. Co. v. Walsh, 193 U. S. 460, 48 L. Ed. 749 11

David Kaufman & Sons Company v. Smith, 216 U. S. 610, 54 L. Ed. 636 10
Debs, Re, 158 U. S. 564, 39 L. Ed. 1092..... 25
De Rees v. Costaguta, 254 U. S. 166, 65 L. Ed. 202.... 7
Doremus v. Hennessey, 176 Ill. 608, 52 N. E. 924..... 49

Page

Eastern States Retail Lumber Dealers' Association v. U. S., 234 U. S. 600, 58 L. Ed. 1490 46
Empire State-Idaho Min. & Dev. Co. v. Hanley, 205 U. S. 225, 51 L. Ed. 779 11
Ensign v. Pennsylvania, 227 U. S. 592, 59 L. Ed. 658 ... 29
Ex parte Virginia, 100 U. S. (10 Otto.) 339, 25 L. Ed. 676 ..... 30, 31

Field v. Barber Asphalt Pav. Co., 194 U. S. 618, 48 L. Ed. 1142 45

Gasaway v. Borderland Coal Corp., 278 Fed. 56 50
Georgia, etc. R. Co. v. Blish Milling Co., 241 U. S. 190, 60 L. Ed. 948 27
Geneva Furniture Co. v. Karpen, 238 U. S. 254, 59 L. Ed. 1259 7
Goldfield v. Miners, 159 Fed. 500 50
Gooch v. Oregon Short Line R. Co., 258 U. S. 22, 66 L. Ed. 443 27
Goodrich v. Ferris, 214 U. S. 71, 53 L. Ed. 914 10
Grace Lothrop, The, 10 Fed. Cas. 901, No. 5653 18
Grace Lothrop, The, 95 U. S. 357, 24 L. Ed. 514 19

Hannis Distilling Co. v. Baltimore, 216 U. S. 285, 54 L. Ed. 482 10
Hebner v. Great Northern R. Co., 78 Minn. 289, 80 N. W. 1128 51
Heffernan v. Whittlsey, 126 Minn. 163, 148 N. W. 63 51
Herndon-Carter Co. v. Norris, 224 U. S. 496, 56 L. Ed. 857 8
Hoban v. Dempsey, 217 Mass. 166, 104 N. E. 717 51
Hopkins v. U. S., 171 U. S. 578, 43 L. Ed. 290 45
Hundley v. Louisville and N. R. Co., 105 Ky. 162, 48 S. W. 429 ..... 38, 51
Huntingdon v. Laidley, 176 U. S. 668, 44 L. Ed. 630 9

Interstate Commerce Commission v. Baird, 194 U. S. 25, 48 L. Ed. 860 33

Joseph B. Thomas, The, 136 Fed. 693 13

Kansas City S. R. Co. v. Carl, 227 U. S. 639, 57 L. Ed. 683 26
Kentucky v. Powers, 201 U. S. 1, 50 L. Ed. 633 31

Lampasas v. Bell, 180 U. S. 276, 45 L. Ed. 527 37
Lillian, The, 131 Fed. 375 13
Louisville & N. R. Co. v. Western Union Tel. Co., 234 U. S. 369, 58 L. Ed. 1356 7

Page

Maynard v. Hecht, 151 U. S. 324, 38 L. Ed. 179..... 8
McAllister v. Chesapeake & Ohio R. Co., 243 U. S. 302, 61 L. Ed. 735 8
McCabe v. A. T. & S. F. R. Co., 235 U. S. 151, 59 L. Ed. 169 .....35, 43
Memphis v Cumberland T. and T. Co., 218 U. S. 624, 54 L. Ed. 1185 31
Missouri K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. Ed. 690..... 26
Mogul S. S. Co., Ltd., The v. McGregor et al., L. R., 23 Q. B. (1889) 598..... 51
Moore-Mansfield Const. Co. v. Electrical Installation Co., 234 U. S. 619, 58 L. Ed. 1503..... 11
Moran v. Hagerman, 151 U. S. 329, 38 L. Ed. 181..... 8
National Fireproofing Co. v. Mason Builders' Ass'n, 169 Fed. 259 47
National Protective Association v. Cumming, 170 N. Y. 315, 63 N. E. 369..... 49
Ohio v. Cox, 257 Fed. 334..... 42
Passenger Cases, The, 7 How. 283, 12 L. Ed. 702..... 25
Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357..... 30
Public Service Co. v. Corboy, 250 U. S. 153, 63 L. Ed. 905. 7
Pullman Co. v. Tamble, 173 Fed. 200..... 41
Raich v. Truax, 219 Fed. 273.....42, 43
Re Debs, 158 U. S. 564, 39 L. Ed. 1092..... 25
Ritter-Conley Mfg. Co. v. Wryn (Okla.) 174 Pac. 280.... 24
Rhodes v. Granby Cotton Mills, 87 S. C. 18, 68 S. E. 824. 51
Roman Catholic Church v. Pennsylvania R. Co., 237 U. S. 575, 59 L. Ed. 1119..... 30
Scott v. Donald, 165 U. S. 107, 41 L. Ed. 648, 654..... 42
Sinsheimer v. United Garment Workers, 28 N. Y. S. 321.. 50
Shelton v. Platt, 139 U. S. 591, 35 L. Ed. 273..... 41
Shepperd v. County Commissioners, 59 Ga. 535..... 24
Shields v. Coleman, 157 U. S. 168, 39 L. Ed. 660..... 8
Slaughter House Cases, 16 Wall. 36, 21 L. Ed. 394..... 30
Smith v. McKay, 161 U. S. 355, 40 L. Ed. 731..... 7
Standard Fashion Co. v. Magrane-Houston Co., 258 U. S. 346, 66 L. Ed. 653..... 47
Standard Oil Co. v. U. S., 221 U. S. 1, 55 L. Ed. 619.... 46

Page

State v. Napier, 63 S. C. 60, 41 S. E. 13..... 24
Stearns v. Wood, 236 U. S. 75, 59 L. Ed. 475..... 37
St. Louis, etc. R. Co. v. Starbird, 243 U. S. 592, 61 L. Ed. 917 27
Sugarman v. U. S., 249 U. S. 182, 63 L. Ed. 550..... 10

The Bayonne, 159 U. S. 687, 40 L. Ed. 306..... 9
The Grace Lothrop, 10 Fed. Cas. 901, No. 5, 653..... 18
The Grace Lothrop, 95 U. S. 357, 24 L. Ed. 514..... 19
The Joseph B. Thomas, 136 Fed. 693 (affirmed in 3rd C. C. A. 148 Fed. 762)..... 13
The Lillian, 131 Fed. 375..... 13
The Mogul S. S. Co., Ltd. v. McGregor et al., L. R. 23 Q. B. (1889) 598 51
The Passenger Cases, 7 How. 283, 12 L. Ed. 702..... 25
Twining v. New Jersey, 211 U. S. 78, 53 L. Ed. 97..... 29

U. S. v. American Tobacco Co., 221 U. S. 106, 55 L. Ed. 663 46
U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588..... 30
U. S. v. E. C. Knight Co., 156 U. S. 1, 39 L. Ed. 325.... 45
U. S. v. Harris, 106 U. S. 629, 27 L. Ed. 290.....29, 30
U. S. v. Lanza, ... U. S. ...., 67 L. Ed. Advance Opinions 169 29
U. S. v. Reading Coal Co., 226 U. S. 324, 57 L. Ed. 243.. 46
U. S. v. Ry. Employees' Dept. A. F. L., 283 Fed. 479.... 25
U. S. v. The Thomas W. Haven, 3 Fed. 347..... 20
U. S. v. Union Pacific R. Co., 226 U. S. 61, 57 L. Ed. 124.. 46
U. S. v. Wheeler, 254 U. S. 281, 65 L. Ed. 270.....29, 31

Vegelahn v. Guntner, 167 Mass. 92, 44 N. E. 1077..... 49
Virginia, Ex parte, 100 U. S. 339, 25 L. Ed. 676.....30, 31

Wabash R. Co. v. Young, 162 Ind. 102, 69 N. E. 1003.. 50
West Virginia Transp. Co. v. Standard Oil Co., 50 W. Va. 611, 40 S. E. 591..... 49
Williams v. Fears, 179 U. S. 270, 45 L. Ed. 186.....24, 45
Willis v. Muscogee Mfg. Co., 120 Ga. 597, 48 S. E. 177.. 51

Zucht v. King, ... U. S. ...., 67 L. Ed. Advance Opinions, 28 11

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1923

No. 156

ALFRED STREET, suing on behalf of himself and all other seamen engaged in interstate and foreign commerce by sea on vessels flying the flag of and engaged in the merchant service of the United States of America and sailing to and from ports on the Pacific Coast of the United States of America,

Appellant,

vs.

SHIPOWNERS' ASSOCIATION OF THE PACIFIC COAST AND PACIFIC AMERICAN STEAMSHIP ASSOCIATION,

Appellees.

} In Equity.

NOTICE OF MOTION TO DISMISS OR AFFIRM.

Sir:

Please take notice that upon the printed transcript of record filed herein, and upon the printed brief of argument annexed hereto and herewith served upon

you, we shall on Monday, the 5th day of November, 1923, and if motions are not then heard, at the next succeeding motion day at the opening of court on that day or as soon thereafter as counsel can be heard, make and submit to the Supreme Court of the United States, at a stated term thereof, to be held in the Capitol, in the City of Washington, District of Columbia, the motion of which the following is a copy.

Dated, San Francisco,
September 26, 1923.

Yours, etc.,
W. F. SULLIVAN,
Counsel for Appellee,
Shipowners' Association of the Pacific Coast.
EDWARD J. McCUTCHEN,
J. M. MANNON, JR.,
A. CRAWFORD GREENE,
Counsel for Appellee,
Pacific American Steamship Association.

To:

H. W. Hutton,
Attorney for Appellant,
Pacific Building,
San Francisco, California.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1923

No. 156

ALFRED STREET, suing on behalf of himself and all other seamen engaged in interstate and foreign commerce by sea on vessels flying the flag of and engaged in the merchant service of the United States of America and sailing to and from ports on the Pacific Coast of the United States of America, *Appellant,* vs. SHIPOWNERS' ASSOCIATION OF THE PACIFIC COAST AND PACIFIC AMERICAN STEAMSHIP ASSOCIATION, *Appellees.*	In Equity

MOTION TO DISMISS OR AFFIRM.

And now come appellees, Shipowners' Association of the Pacific Coast, by W. F. Sullivan, its counsel, and Pacific American Steamship Association, by Edward J. McCutchen, J. M. Mannon, Jr., and A. Crawford

Greene, its counsel, and move to dismiss, with costs, the appeal taken herein by the above named Alfred Street, upon the ground that this court has no jurisdiction of the same and because the said appeal is informal, irregular and insufficient on the grounds stated in the annexed argument; and the said appellees also move this court to affirm the judgment of the District Court herein upon the ground that it is manifest that the questions on which the decision of the cause depends are so frivolous as not to need further argument.

Dated, San Francisco,
September 26, 1923.

W. F. SULLIVAN,
Counsel for Appellee,
Shipowners' Association of the Pacific Coast.

EDWARD J. McCUTCHEN,
J. M. MANNON, JR.,
A. CRAWFORD GREENE,
Counsel for Appellee,
Pacific American Steamship Association.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1923

No. 156

ALFRED STREET, suing on behalf of himself and all other seamen engaged in interstate and foreign commerce by sea on vessels flying the flag of and engaged in the merchant service of the United States of America and sailing to and from ports on the Pacific Coast of the United States of America, *Appellant,* vs. SHIPOWNERS' ASSOCIATION OF THE PACIFIC COAST AND PACIFIC AMERICAN STEAMSHIP ASSOCIATION, *Appellees.*	In Equity

BRIEF FOR APPELLEES.

This appeal is from a final decree of the Southern Division of the District Court of the United States, for the Northern District of California, Second Division, dismissing appellant's complaint. The complaint

and the motions to dismiss will be found in the printed transcript filed herein at pages 1, 6 and 7, respectively. The only question on this appeal is whether the complaint was properly dismissed on such motions. For the purposes of this argument all of the facts properly pleaded in the complaint will be taken to be admitted, and the statement of facts in this case is accordingly the complaint itself.

Argument on Motion to Dismiss.

The appeal should be dismissed by this court for want of appellate jurisdiction. The cases other than those permitted by the anti-trust laws in which direct appeals from the District Courts to the Supreme Court will lie are specified in Section 238 of the Judicial Code (Comp. Stats. Sec. 1215) as follows:

> "Appeals and writs of error may be taken from the district courts, including the United States district court for Hawaii and the United States district court for Porto Rico, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; from the final sentences and decrees prize causes; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States."

We shall discuss in order each of the cases to which the above statute refers and demonstrate that the appeal in this case does not come within any of its provisions. The lack of grounds for direct appeal is obvious.

I.

THIS APPEAL IS NOT "A CASE IN WHICH THE JURISDICTION OF THE COURT IS IN ISSUE, IN WHICH CASE THE QUESTION OF JURISDICTION ALONE SHALL BE CERTIFIED * * *".

It is well established that this clause refers to cases in which jurisdiction of the lower court as a *federal court* is put in issue, and not to cases in which its general jurisdiction as a court of law or equity is in question. Thus the question whether or not a bill of complaint states a case of equitable cognizance is not a case in which a direct appeal can be taken under this clause.

Smith v. McKay, 161 U. S. 355, 40 L. Ed. 731;
Bien v. Robinson, 208 U. S. 423, 52 L. Ed. 556;
Louisville & N. R. Co. v. Western Union Tel. Co., 234 U. S. 369, 58 L. Ed. 1356;
Geneva Furniture Co. v. Karpen, 238 U. S. 254, 59 L. Ed. 1295;
Public Service Co. v. Corboy, 250 U. S. 153, 63 L. Ed. 905;
De Rees v. Costaguta, 254 U. S. 166, 65 L. Ed. 202.

It is apparent in this case that the dismissal by the lower court was not upon the ground that there was no *federal jurisdiction*, but rather on the ground that the

complaint stated no facts to give the plaintiff a cause of action, or grounds for relief at law or in equity. As the District Judge says in his memorandum opinion (Trans. p. 9):

> "So far as I am advised, the suit is without precedent, and I have been unable to formulate any theory of law upon which the complaint can be sustained. * * *
>
> Besides, the plaintiff is not shown to have any standing entitling him to seek in court the general relief for which he prays. * * *
>
> Nor does he connect himself with the rule or practice of which he complains."

Even when a proper question of jurisdiction is raised by the decree of the lower court that question alone must be certified to the Supreme Court from the court below to support a direct appeal.

Judicial Code, Section 238, above quoted;
Maynard v. Hecht, 151 U. S. 324, 38 L. Ed. 179;
Moran v. Hagerman, 151 U. S. 329, 38 L. Ed. 181.

It has been held that a formal certificate is not necessary, but that if the record contains its equivalent in an order or decision of the lower court, the rule is satisfied.

Shields v. Coleman, 157 U. S. 168, 39 L. Ed. 660;
Herndon-Carter Co. v. Norris, 224 U. S. 496, 56 L. Ed. 857;
McAllister v. Chesapeake & Ohio R. Co., 243 U. S. 302, 61 L. Ed. 735.

In such cases, however, the record must plainly show that the question of jurisdiction *alone* is sent up for decision on the appeal. This rule is explicitly stated in

Arkansas v. Schlierholz, 179 U. S. 598, 45 L. Ed. 335;

Huntington v. Laidley, 176 U. S. 668, 44 L. Ed. 630;

The Bayonne, 159 U. S. 687, 693, 40 L. Ed. 306, 309;

Chappell v. U. S., 160 U. S. 499, 508, 40 L. Ed. 510, 513;

Apapas v. U. S., 233 U. S. 587, 58 L. Ed. 1104.

In this case there is no certificate; the decree of the lower court (Trans. p. 11) is a general decree of dismissal with no reference to a want of jurisdiction; the petition for appeal (Trans. p. 11) expressly asks for an appeal "for the reason that the questions arising upon this said appeal involve *both the application and the application* ("both the construction and the application"?) of the constitution of the United States, for the reasons specified in the assignment of errors which is filed herewith." The assignment of errors referred to sets out (Trans. p. 12) twenty-five alleged errors raising various alleged constitutional and statutory questions; and lastly, the order granting the appeal (Trans. p. 12) is general and not confined to any question of jurisdiction. It is obvious not only that there is no single question of jurisdiction certified, but also that there is no equivalent for such certification, and the appeal cannot lie on the ground that the jurisdiction of the court is called in question.

II.

THIS APPEAL IS NOT A "CASE THAT INVOLVES THE CONSTRUCTION OR APPLICATION OF THE CONSTITUTION OF THE UNITED STATES".

Appellant's petition for appeal (Trans. p. 11), his assignments of error, Nos. 1, 6, 9, 11, 12, 22, 23 and 24 (Trans. p. 12), and the arguments contained in his brief already filed show that the theory upon which a direct appeal has been taken is that this case involves the construction or application of the constitution.

The theory of an appellant that a constitutional question has been raised is, of course, not binding upon this court, and even when a party claims in his pleadings, his assignment of errors, or his argument that his constitutional rights are involved, an appeal does not lie under the provisions of Section 238 of the Judicial Code now under consideration, unless the court is of the opinion that the constitutional question raised is substantial and more than a frivolous or colorable attempt to confer jurisdiction upon the Supreme Court.

David Kaufman & Sons Company v. Smith, 216 U. S. 610, 54 L. Ed. 636, 637;

Hannis Distilling Co. v. Baltimore, 216 U. S. 285, 54 L. Ed. 482;

Sugarman v. U. S., 249 U. S. 182, 63 L. Ed. 550;

Goodrich v. Ferris, 214 U. S. 71, 53 L. Ed. 914;

Berkman v. U. S., 250 U. S. 114, 63 L. Ed. 877.

In order to have a substantial constitutional question within the meaning of this case the constitution of the United States must be directly and necessarily involved, and if the real question is one of general law

it is not sufficient to attach that to one of the constitutional guaranties.

Empire State-Idaho Min. & Dev. Co. v. Hanley, 205 U. S. 225, 51 L. Ed. 779;

Moore-Mansfield Const. Co. v. Electrical Installation Co., 234 U. S. 619, 58 L. Ed. 1503;

Cosmopolitan Min. Co. v. Walsh, 193 U. S. 460, 48 L. Ed. 749.

The constitutional question or questions raised may be rendered unsubstantial and frivolous by previous decisions of the court.

Brolan v. U. S., 236 U. S. 216, 59 L. Ed. 544;

Zucht v. King, ... U. S. .....; 67 L. Ed. Advance Opinions 28.

We submit that the constitutional questions which appellant claims are raised in this case are so obviously unsubstantial and frivolous, or are rendered so unsubstantial and frivolous by previous decisions of this court that they cannot furnish the basis for a direct appeal. In order to demonstrate this we shall discuss in order each of appellant's claims under the constitution.

A. The claim that the acts complained of violate the commerce clause of the constitution is unsubstantial and frivolous.

This claim is specifically set forth in appellant's first assignment of error (Trans. p. 13):

> "In not finding and deciding that the rules prescribed by defendants to enable seamen to engage in interstate and foreign commerce were regulations of such interstate and foreign commerce, and

within the exclusive power of The Congress of the United States to make under the provisions of subdivision 3 of Section 8 of Article I of the Constitution of the United States."

The same claim is found less completely expressed in assignments Nos. 2, 3, 4, 5, 6, 9, 22 and 25 (Trans. pp. 13-15). It is advanced several times in appellant's brief, more particularly at pages 22 to 27, inclusive.

The gist of this claim is that Congress has, by the Shipping Commissioners Act (*Revised Statutes,* Sections 4501, et seq., as amended), exclusively regulated the employment of merchant seamen; that defendants' acts are a regulation of such employment; and that defendants' acts are therefore unconstitutional.

This argument proceeds upon a mistaken premise and concludes with a *non sequitur.* It is both so mistaken and so illogical as to be entirely unsubstantial and frivolous.

(1) Congress has not regulated the preliminary engagement of seamen.

In the first place, the Shipping Commissioners Act is not even a regulation, much less an exclusive regulation of the actual employment of seamen. The act does deal in considerable detail with the rights and duties of seamen *during* their employment, and provides for the appointment of shipping commissioners to aid in the establishment of those rights and duties. Among other things it provides certain necessary terms of the contract of employment, specifies the rations to which seamen are entitled during the voyage, regulates the pay-

ment of their wages, establishes the maximum of service to be required from them, and provides for the manner of their discharge. In the case of certain voyages the contract of employment must be signed in the presence of the commissioner.

The act is not exclusive, even within the scope of its provisions. Thus, although it does provide that the contract shall contain certain terms (*Revised Statutes,* Section 4511), the very section so providing allows the parties to make any stipulation not contrary to the act or to other law.

The Lillian, 131 Fed. 375;
The Joseph B. Thomas, 136 Fed. 693, (affirmed in 3rd C. C. A., 148 Fed. 762).

But the method of obtaining men for employment prior to the actual execution of the contract of employment is not even within the scope of the act's regulation, much less within its exclusive regulation. It is apparent that the provision of *Revised Statutes,* Section 4507 (relied upon by appellant in his brief, p. 24), that the Shipping Commissioner shall "procure suitable offices and rooms for the shipment and discharge of seamen", cannot be stretched to mean that in such offices and rooms *alone* can seamen be obtained for employment. It is equally clear that *Revised Statutes,* Section 4508 (Appellant's Brief, p. 25), providing that the general duties of the Shipping Commissioner shall include the duty "to afford facilities for engaging seamen by keeping a register of their names and characters", cannot be construed as more than a provision

pursuant to which the free services of a government official may be furnished, and that there is no attempt to regulate the use of those services. It may not be amiss in this connection to recall the fact that Congress has for several years appropriated funds "to enable the Secretary of Labor to foster, promote and develop the welfare of the wage earners of the United States, to improve their working conditions, to advance their opportunities for profitable employment by maintaining a national system of employment offices * * *". (Act of March 28, 1922, ch. 117, title II, 42 Stat. 489; Comp. Stats. 1923 Supp. Section 953a.)

It is a matter of common knowledge that such employment offices have been established throughout the country and the service which they render is undoubtedly of value. The contention, however, that Congressional provision for such a system becomes an exclusive regulation of interstate commerce, and prevents employers of labor in interstate commerce from maintaining their own employment offices or from using the unions or other agencies as employment offices would astound employers, labor unions and everyone concerned, and would be absurd on its face. If, however, the principle for which appellant contends in this case is sound, the act to which we have above referred, and from which we have quoted, provides an exclusive regulation of interstate commerce. Appellant's argument can be given no other meaning.

It is, we submit, clear that the provision for furnishing services in a certain field is not a regulation of that field, much less an exclusive regulation.

Appellant also relies upon *Revised Statutes,* Section 4508 (Appellant's Brief, p. 25), which provides that it is the duty of the Shipping Commissioner "to superintend their [referring to seamen] engagement and discharge, in the manner provided by law." This provision clearly refers to later provisions of the Revised Statutes, which provide that the Commissioner shall oversee the signing by seamen of their contracts of employment. The word "engagement" used in this context means the actual signing of shipping articles, and not the perliminary supplying of seamen. Nowhere does the law referred to specifically touch upon such preliminary supplying, with the possible exception of *Revised Statutes,* Section 4515. That section is perhaps the innocent cause of appellant's misconception. The section provides:

> "If any master, mate, or other officer of a vessel knowingly receives, or accepts, to be entered on board of any merchant-vessel, any seaman who has been engaged or supplied contrary to the provisions of this Title, the vessel on board of which such seaman shall be found, shall, for every such seaman, be liable to a penalty of not more than two hundred dollars."

The language above quoted might be claimed to lend support to the contention of appellant, if it were not examined in the light of its history and purpose. Appellant emphasizes in his brief the words "engaged or supplied", and then asserts that this and the preceding section (*Revised Statutes,* Section 4514) "make the supplying of seamen by the Shipping Commissioner *exclusive,* the language is as clear as it is possible to

make it." Section 4514, however, only requires that the shipping articles shall be signed by each seaman as prescribed in Sections 4511 to 4513 of the *Revised Statutes,* before such seaman "shall be carried to sea". Under that section a seaman might be hired ten days before sailing and only sign the articles an hour before sailing, and yet no penalty would attach. Appellant's assertion, therefore, that these sections "make the supplying of seamen by the Shipping Commissioner *exclusive*" must rest for support entirely on *Revised Statutes,* Section 4515. But in spite of the fact that counsel for appellant realizes that our Shipping Commissioners Act "was taken almost verbatim from the British Merchant Shipping Act" (Appellant's Brief, p. 24), he has apparently failed to examine the use of the words "engaged or supplied" in that original source, the British Act. That act was The Merchant Shipping Act, 1854, 17 and 18 Vict., ch. 104. Our *Revised Statutes* Section 4515 was taken with a slight change of wording from Section 147 (3) of the British Act, which provides (italics ours):

> "(3) If any person knowingly receives or accepts to be entered on board any ship, any seaman or apprentice who has been *engaged or supplied* contrary to the provisions of this Act, he shall for each such seaman or apprentice, incur a penalty not exceeding twenty pounds."

The British section has a definite meaning for the words "engaged or supplied contrary to the provisions of this act", a meaning readily ascertainable from an examination of the other provisions of the act. Sec-

tion 146 and Section 147 of the British Act read as follows:

> "146. The Board of Trade may grant to such persons as it thinks fit licenses to engage or supply seamen or apprentices for merchant ships in the United Kingdom, to continue for such periods, to be upon such terms and to be revocable upon such conditions as such Board thinks proper."
>
> "147. The following offenses shall be punishable as hereinafter mentioned; (that is to say)
>
> (1) If any person not licensed as aforesaid, other than the owner or master or mate of the ship or some person who is *bona fide* the servant and in the constant employ of the owner, or a Shipping Master duly appointed as aforesaid, engages or supplies any seaman or apprentice to be entered on board any ship in the United Kingdom, he shall for each seaman or apprentice so engaged or supplied, incur a penalty not exceeding twenty pounds.
>
> (2) If any person employs any unlicensed person other than the persons so excepted as aforesaid, for the purpose of engaging or supplying any seaman or apprentice to be entered on board any ship in the United Kingdom, he shall for each seaman or apprentice so engaged or supplied, incur a penalty not exceeding twenty pounds, and if licensed, shall in addition forfeit his license.
>
> (3) If any person knowingly receives or accepts to be entered on board any ship, any seaman or apprentice who has been *engaged or supplied* contrary to the provisions of this Act, he shall for each such seaman or apprentice, incur a penalty not exceeding twenty pounds."

In passing the American Shipping Commissioners Act, however, Congress, while appropriating the provisions of paragraph (3) of Section 147, omitted to cover the ground referred to in paragraphs (1) and (2),

as well as the provisions of Section 146 of the British Act, and it is accordingly obvious that while the words "engaged or supplied contrary to the provisions of this act" or this title have a very important meaning in the British Act they have no such meaning and no apparent meaning in the American Act. There is nothing in our statutes to provide for a system of licensed employment agents like that in England, and there can be no penalty imposed upon a ship owner for receiving seamen engaged or supplied by someone other than such a licensed agent. If *Revised Statutes* Section 4515 has any meaning at all, it must be merely cumulative to *Revised Statutes* Section 4514, and be construed to provide for the imposition of a further penalty for taking men who have not signed shipping articles.

Section 4515 has not been without judicial interpretation and comment. In

> *The Grace Lothrop,* 10 Fed. Cas. 901, No. 5,653, (1 Holmes, 342; 1 Cent. Law J. 189; 8 Am. Law Rev. 620)

it was contended that *Revised Statutes* Section 4515 (then Section 14 of the Act of 1872) could be extended to penalize a violation of the Act of 1790. The opinion by District Judge Lowell is instructive (p. 903):

> "I consider it tolerably certain that this part of section 14 has no such intent. The offense is receiving on board seamen who have been engaged or supplied contrary to the provisions of the act. Now there is nothing in the act, or in any other

that I know of, which regulates the engaging or supplying of seamen before they are taken on board ship. * * * This penal clause, excepting in the amount of penalty, and the person who is to pay it, is taken literally from the merchant shipping act of Great Britain of 1854, Sec. 147, in which it has a totally different sense from that now proposed for it. That statute provides not only for shipping commissioners (called in that act 'shipping masters'), before whom agreements are to be signed and men discharged, etc., but also that a certain number of persons may be licensed in a certain way to procure and supply seamen for merchant-ships, that is to say, to make the original and general oral engagement with them; and there is a penalty on any unlicensed person who shall procure or supply seamen; and a penalty on the master who receives on board persons so unlawfully engaged or supplied, which is the clause now under review. Its intent is plain and intelligible, and has nothing to do with the written agreement one way or another. Now I admit that our act does not provide for any such license, and therefore cannot have the meaning given it in England, and I admit we must try to give a meaning to every part of every act of congress; but I cannot admit that I ought to exercise a great deal of ingenuity to find a secondary or conjectural sense for a set of words which has been taken bodily from a place where its intent is obvious, and put into one where there is no apparent meaning for it."

This case was affirmed by the Supreme Court in

The Grace Lothrop, 95 U. S. 357, 24 L. Ed. 514,

but on the ground that the act did not apply to coastwise shipping, and without discussion of *Revised Statutes* Section 4515.

The same district judge who decided the case of *The Grace Lothrop*, again commented upon *Revised Statutes* Section 4515 in a later case,

U. S. v. The Thomas W. Haven, 3 Fed. 347,

in the following words (p. 349) (italics ours):

> "Upon a review of the opinion expressed in *The Grace Lothrop*, 1 Holmes, 342, I am unable to see anything to correct in what I then said, and I would refer to the report of that case for my views upon section 4515, then a part of statute 1872, sec. 14, (17 St. 265). We have no law requiring the master to make his contract with the seamen before receiving them on board his vessel; in both sorts of voyage, foreign and domestic, the command is to make the contract before proceeding on the voyage. Rev. St. secs. 4511, 4520. The section upon which this information proceeds is copied literally, and somewhat thoughtlessly, from the English merchant shipping act, 17 and 18 Vict. c. 104, secs. 146 and 147. By that law, merchant seamen are to be 'engaged and supplied' by licensed brokers, and a penalty is imposed upon any one, not such broker, who engages or supplies such seamen, and upon any one who knowingly receives on board a merchant vessel seamen so illegally engaged or supplied. *Our law has no corresponding provision for licensing brokers or for supplying ships with seamen, and the only possible meaning of the English law is impossible with us.* No doubt any hiring of a seaman may be called engaging him, and he is engaged when he is contracted with. The word has that meaning in some parts of our shipping acts, and in some parts of the merchant shipping act. It cannot have it in section 4515, because, as we have seen, the statutes provide that the written contract, or 'engagement', in that broad sense, is to be made at any time before the vessel proceeds to sea; therefore, no oral engagement can be illegal until the last moment has elapsed in which a writ-

ten engagement must be made, which is the moment before the anchor is weighed. Up to that time there is a *locus penitentiae. Section 4515 does not define the illegality, and I have sought in vain through the title to find any.*"

This historical analysis, as well as the construction of the provisions of the act itself, conclusively disposes of appellant's argument that the Shipping Commissioners Act regulates, or exclusively regulates the supplying of men for employment. There is no complaint that appellees have violated any of the mandatory provisions of the act. It is not a fact and it is not alleged as a fact that appellees have disobeyed the requirement that seamen be signed on before the shipping Commissioner for the voyages upon which such action is required. The existence of an employment office where men are originally secured is entirely consistent with the making of actual contracts of employment in writing before the Commissioner. For years labor unions have supplied seamen in just this way without any objection that the Shipping Commissioners Act has been violated, and they cannot with reliance upon either precedent or authority fairly object to the same practice on the part of an employer.

If the maintenance of an employment office is legal, as it clearly is, it follows that the other matters complained of, which are merely incidental and secondary thereto, are proper. Thus, as far as the Shipping Commissioners Act goes the method of administering the system by keeping records, requiring seamen to carry registration cards, and the treating of applications in

the order of priority is legally unobjectionable. These questions we shall later discuss in connection with the claims of appellant under the anti-trust laws.

(2) Appellees' acts of employment, whether consistent or inconsistent with the provisions of the Shipping Commissioners Act, are not an interference with interstate commerce.

It is clear that the establishment of the employment bureau referred to in the complaint does not violate the Shipping Commissioners Act. If, however, it should be conceded that appellees have proceeded contrary to the provisions of the Shipping Commissioners Act, the decision of the lower court on that point would not raise a constitutional question, but rather a question of federal law not appealable to this court under *Judicial Code* Section 238. Counsel for appellant apparently realizes this, for his argument is not solely that appellees have violated a federal act but that they have violated a provision of the constitution. It has been shown that Congress has not even regulated, much less exclusively regulated, the supplying of seamen for employment. If, however, Congress had provided exclusive regulations, pursuant to which seamen must be supplied, that would not make the acts of appellees unconstitutional.

(a) They do not directly affect commerce.

In the first place the acts of appellees complained of herein are not a regulation of commerce because they do not affect commerce itself, but only affect matters prior to its inception. Even if the acts of individuals could be a "regulation" in the constitutional law sense, the acts here involved are not sufficiently connected with

commerce to constitute a regulation. The line between acts directly affecting commerce and acts not directly affecting commerce was fixed in

Adair v. U. S., 208 U. S. 161, 178, 179, 52 L. Ed. 436,

and it was clearly fixed at a point beyond the contract of employment; the court there held that an act of Congress making it unlawful for an interstate carrier to make non-membership in a union a condition of employment, or of continuation in employment, was unconstitutional because it had no real or substantial connection with interstate commerce. The court said (italics ours):

> "Manifestly, any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the states, must have some real or substantial relation to or connection with the commerce regulated. *But what possible legal or logical connection is there between an employee's membership in a labor organization and the carrying on of interstate commerce? Such relation to a labor organization cannot have, in itself and in the eye of the law, any bearing upon the commerce with which the employee is connected by his labor and services.* * * *
>
> Looking alone at the words of the statute for the purpose of ascertaining its scope and effect, and of determining its validity, we hold that there is no such connection between interstate commerce and membership in a labor organization as to authorize Congress to make it a crime against the United States for an agent of an interstate carrier to discharge an employee because of such membership on his part. If such a power exists in Congress it is difficult to perceive why it might not by absolute regulation, require interstate carriers, under penal-

ties, to employ, in the conduct of its interstate business, only members of labor organizations, or only those who are not members of such organizations,—a power which could not be recognized as existing under the Constitution of the United States."

The same principle was considered in

Williams v. Fears, 179 U. S. 270, 45 L. Ed. 186;
Brazee v. Michigan, 241 U. S. 340, 60 L. Ed. 1034;
Shepperd v. County Commissioners, 59 Ga. 535;
State v. Napier, 63 S. C. 60, 41 S. E. 13;
Ritter-Conley Mfg. Co. v. Wryn, (Okla.) 174 Pac. 280.

The employment itself is not interstate or foreign commerce. Interstate or foreign commerce, within the meaning of the decisions, consists of transactions carried on *after the employment by the employer,* and unless such commerce is directly affected there is no "regulation" of commerce. Appellees' acts do not affect commerce within the meaning of the decisions.

(b) Appellees' acts, as distinguished from state action, can under no circumstances constitute an interference with interstate commerce.

The acts of which appellant complains are the actions of individuals and not of a state or of individuals acting under state authority. There is no such thing as a regulation of commerce by individuals which conflicts with the exclusive power of regulation by Congress. The exclusiveness of Congressional regulation so often mentioned is an exclusiveness as against state action, not as against individual action. The exclusive-

ness of such regulation as against state action is established in

The Passenger cases, 7 How. 283, 12 L. Ed. 702,

and a very long line of similar cases. An individual, however, can do anything in the field of interstate and foreign commerce not directly in violation of express federal legislation,—and indeed can even violate that legislation without raising a constitutional question. While the direct illegal interference of a private individual with the conduct of interstate commerce gives the executive branch of the government the constitutional right to enjoin such interference in order to protect the exercise of the constitutional power delegated to Congress,

Re Debs, 158 U. S. 564, 39 L. Ed. 1092;

U. S. v. Ry. Employees' Dept. A. F. L., 283 Fed. 479,

there must be, nevertheless, for the exercise of this power such an interference as to paralyze the force of the laws, and the United States must be the plaintiff. Appellant has cited no case in which a private individual has maintained a bill for an injunction against another individual or against other private parties based solely on the commerce clause of the constitution.

If appellant's argument is valid it means that the Interstate Commerce Act is a regulation exclusive even as against the acts of individuals; that therefore any act by an individual in the field of such commerce not expressly allowed in the statutes is unconstitutional, whether it conflicts with and violates the statutes or

not; and further that any other individual injured thereby can have such an act enjoined. It would then be quite unnecessary for courts in suits between individuals to determine whether acts of defendants complained of were or were not violations of the statutes; it would only be necessary to determine whether they were expressly permitted by the statutes; and if they were not, to brand them as unconstitutional, and to enjoin them. Individual freedom of action in the whole field of commerce would thus become a thing of the past.

The contention is, of course, absurd, and is demonstrated to be absurd by the decisions of this court. The Carmack Amendment to the Interstate Commerce Act, for instance, contained many detailed provisions for the issuance of bills of lading by carriers, and for carriers' liabilities thereunder. It was nevertheless held in several cases that the carrier could by a fair, open, just and reasonable agreement, limit the amount recoverable by a shipper in case of loss or damage until Congress had expressly made such limitation illegal.

Adams Express Co. v. Croninger, 226 U. S. 491, 57 L. Ed. 314;

Kansas City S. R. Co. v. Carl, 227 U. S. 639, 57 L. Ed. 683;

Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. Ed. 690;

Cincinnati etc. R. Co. v. Rankin, 241 U. S. 319, 60 L. Ed. 1022.

The first of the cases above referred to is of especial interest in this connection for the court there held that the amendment was such a regulation of commerce as to

exclude state action in the same field, and at the same time sustained the action of the carrier in going beyond the provisions of the amendment and making a contract not expressly allowed by the amendment, although not in violation of its terms. In the same way, although Congress has provided liability for certain losses on the part of all interstate carriers, that does not prevent such carriers from exacting a stipulation that notice of loss must be given within a reasonable time. Such a stipulation has been held to be valid, and the giving of such notice becomes a condition precedent to liability in spite of the fact that it is a "regulation" not authorized by the federal statutes.

Georgia etc. R. Co. v. Blish Milling Co., 241 U. S. 190, 60 L. Ed. 948.

St. Louis etc. R. Co. v. Starbird, 243 U. S. 592, 61 L. Ed. 917;

Gooch v. Oregon Short Line R. Co., 258 U. S. 22, 66 L. Ed. 443.

The rule for which appellant contends would in application entail interesting and disastrous results. It would mean that when Congress has provided an eight hour day for employees of interstate carriers, no such carrier could by its own rule divide that day into two four hour periods with an hour between—for that would be a "regulation" in a field where Congress has exclusively regulated. It would mean that when Congress has provided that freight cars should be equipped with air brakes the carrier could not provide that they be equipped also with hand brakes. It would mean that no carrier could provide and post rules of safety for

its employees and passengers unless they were quoted from an act of Congress. Finally, it would mean that interstate commerce must be controlled and operated in all its aspects by the direction of Congress itself. This is the *reductio ad absurdum* of appellant's argument that this appeal lies because Article I, Section 8, sub-section 3 of the Constitution is involved.

The preceding discussion has been predicated upon the assumption that the acts of appellees are not directly in violation of any federal statute, but that they are only in the same field. If, however, the acts of appellees were in violation of the federal statutes appellant's case under the commerce clause would receive no support. In neither case is there a "regulation" of commerce. Any argument to the contrary would mean that whenever an individual violated a federal statute passed under the power granted in the commerce clause, a constitutional question would be raised despite defendant's admission that the statute itself was constitutional. Every case involving federal commerce laws could then be taken directly to this court.

B. The claims that the acts complained of deprive appellant of life, liberty or property without due process of law or deprive him of the equal protection of the laws or deprive him of the privileges and immunities of citizenship guaranteed by the constitution, are all unsubstantial and frivolous.

Appellant's other so-called "constitutional" grounds for direct appeal (Appellant's Brief, pp. 18-20; Assignment of Errors, Nos. 12, 23, 24) are all based upon the "due process" clause found in the Fifth Amendment and again in the Fourteenth Amendment, or upon the

"privileges and immunities" clauses, found in Article IV, Section 2 and in the Fourteenth Amendment, or upon the "equal protection" clause in the Fourteenth Amendment. We shall take these various constitutional provisions in turn and show that under no one of them does plaintiff raise a substantial question.

In the first place, it is axiomatic that the Fifth Amendment is *solely a restriction upon the powers of Congress* and has no reference to action by the states or by individuals not under authority of an Act of Congress.

U. S. v. Lanza, ... U. S. ....., 67 L. Ed. Advance Opinions 169;

Ensign v. Pennsylvania, 227 U. S. 592, 57 L. Ed. 658;

Twining v. New Jersey, 211 U. S. 78, 53 L. Ed. 97;

Barrington v. Missouri, 205 U. S. 483, 51 L. Ed. 890;

Brown v. New Jersey, 175 U. S. 172, 44 L. Ed. 119;

Barron v. Baltimore, 7 Pet. 243, 8 L. Ed. 672.

Therefore the acts of appellees complained of cannot possibly raise a question under the Fifth Amendment.

Similarly, sub-section I of Section 2 of Article IV, which provides that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states" *applies only to state action*, and merely means that no state shall deny to citizens of other states the privileges and immunities it gives to its own citizens.

U. S. v. Wheeler, 254 U. S. 281, 65 L. Ed. 270;

U. S. v. Harris, 106 U. S. 629, 27 L. Ed. 290;

Slaughter House Cases, 16 Wall. 36, 21 L. Ed. 394;
Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357.

There is no possible connection between this constitutional provision and the present case.

Likewise, the provisions of the Fourteenth Amendment relied upon, namely that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person the equal protection of the laws", all apply solely to state action and not to the acts of individuals.

U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588;
Ex parte Virginia 10 Otto. 339, 25 L. Ed. 676;
U. S. v. Harris, 106 U. S. 629, 27 L. Ed. 290;
Civil Rights Cases, 109 U. S. 3, 27 L. Ed. 835;
Barney v. New York, 193 U. S. 430, 48 L. Ed. 737;
Roman Catholic Church v. Pennsylvania R. Co., 237 U. S. 575, 59 L. Ed. 1119.

As this court said in *U. S. v. Cruikshank,* supra, (23 L. Ed. 592) (italics ours):

> "The Fourteenth Amendment prohibits a State from depriving any person of life, liberty or property, without due process of law; *but this adds nothing to the rights of one citizen as against another* • • •
>
> The Fourteenth Amendment prohibits a State from denying to any person the equal protection of the laws; *but this provision does not,* any more than the one which precedes it and which we have just considered, *add anything to the rights which one citizen has under the Constitution against an-*

> *other.* The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. *That duty was originally assumed by the States; and it still remains there.* The only obligation resting upon the United States is to see that the States do not deny the right. This the Amendment guaranties, but no more. The power of the National Government is limited to the enforcement of this guaranty."

The same reasoning is more particularly applied to the "due process" clause in

Memphis v. Cumberland T. and T. Co., 218 U. S. 624, 54 L. Ed. 1185;

to the "equal protection" clause in

Kentucky v. Powers, 201 U. S. 1, 50 L. Ed. 633,

and to the "privileges and immunities" clause in

Ex parte Virginia, 100 U. S. 339, 25 L. Ed. 676;

U. S. v. Wheeler, 254 U. S. 281, 65 L. Ed. 270.

In all of these cases it is held that the Fourteenth Amendment is *applicable only to state action, and not to the action of individuals.*

In the light of these cases, appellant's argument for direct appeal under the Fourteenth Amendment is demonstrated to be invalid. He is not complaining of a state statute, or of acts done under authority thereof, but solely of the acts of individuals. If he has any rights which individuals are violating, he must look to state law or federal statutes for his protection and not to the federal Constitution.

III.

THIS APPEAL IS NOT A "CASE IN WHICH THE CONSTITUTIONALITY OF ANY LAW OF THE UNITED STATES" IS DRAWN IN QUESTION; NOR IS IT ANY ONE OF THE OTHER CASES SPECIFIED IN SECTION 238 OF THE JUDICIAL CODE IN WHICH DIRECT APPEAL TO THE SUPREME COURT MAY BE HAD.

The only laws of the United States concerned in this case are the Shipping Commissioner's Act and the anti-trust laws. Appellant, of course, relies on them, and does not question their constitutionality. But appellees equally admit their *constitutionality* and *validity* and only question their *construction* and *applicability* as urged by appellant in the present case. Thus the only question by any possibility raised in connection with federal laws is the question of their proper meaning and construction. No one attacks their constitutionality, or even questions it. There is not the slightest ground for direct appeal under this clause of Section 238 of the Judicial Code.

Similarly this case is obviously not within any of the other clauses of Section 238. It is obviously not one of the "final sentences and decrees in prize causes". There is no *treaty* involved whose "validity or construction" is drawn in question. And lastly there is no *state constitution or statute* which "is claimed to be in contravention of the Constitution of the United States". The case is not within Section 238 of the Judicial Code.

IV.

THIS APPEAL DOES NOT LIE UNDER THE ANTI-TRUST LAWS BECAUSE THE UNITED STATES IS NOT PARTY-PLAINTIFF.

Much of appellant's brief (pp. 10-18, 20-22, 34-42) is devoted to an exposition of his case under the anti-trust laws. But even assuming for the purpose of argument that he had a case under the anti-trust laws, that would not give him the right to direct appeal to the Supreme Court. It would make the case merely one for the construction and application of federal statutes, appealable only to the Circuit Court of Appeals.

It is true that Congress has provided by the Act of February 11, 1903, Ch. 544, Sec. 2 (32 Stats. 823, Comp. St. Sec. 8825) that direct appeals to the Supreme Court will lie in anti-trust cases *"wherein the United States is complainant"*. This has been held to include cases in which the Interstate Commerce Commission, represented by the Attorney-General is the complainant.

Interstate Commerce Commission v. Baird, 194 U. S. 25, 48 L. ed. 860.

But it is, of course, confined to suits in which some executive branch or body of the federal government is the complainant. Alfred Street, as an individual suing in his own name, should have appealed to the Circuit Court of Appeals.

Summary of Argument on Motion to Dismiss.

We have now covered all grounds which may be assigned as the basis for direct appeal in this case. We

have shown that this is not a case in which the jurisdiction of the lower court is questioned and that question alone certified for appeal; that it is not a case involving the construction or application of the Constitution because each of appellant's alleged constitutional questions is frivolous and unsubstantial; that it is not a case covered by any other clause of the section in the Judicial Code allowing direct appeals; and that it is not the kind of an anti-trust case in which a direct appeal lies. It is, therefore, submitted that this appeal is wrongly taken and should be dismissed.

Argument for Motion to Affirm and for Affirmance on Appeal.

If for any reason this court should overrule our motion to dismiss the appeal in this case, and should take jurisdiction to hear the appeal on its merits, it is clear that the action of the lower court in dismissing appellant's complaint was correct and that the judgment should be affirmed. Much of our argument on the motion to dismiss is also pertinent to the merits of the appeal, and where such is the case we shall re-incorporate it in this part of our brief by reference, without repetition; but we shall consider other matters incident to this appeal including the lack of ground for injunctive relief, the form of the suit, the anti-trust question, all as follows:

I.

THE BILL OF COMPLAINT STATES NO CAUSE OF ACTION BECAUSE IT SHOWS NO CONNECTION BETWEEN THE ACTS OF APPELLEES AND APPELLANT, TO THE INJURY OF APPELLANT.

The complaint charges that by reason of the record and registration system inaugurated by appellees appellant refuses to continue in employment (Complaint, par. IX., Trans. p. 4). But there is no allegation that appellant has ever applied for employment; no allegation that appellant has ever suffered or will ever suffer any specific loss or damage whatsoever by reason of any act of appellees.

Even when a defendant's acts as alleged are illegal, plaintiff must connect himself with them in some way, must show some injury, and cannot have them enjoined merely because they are distasteful to him, or because others may be injured. This court said in

McCabe v. A. T. & S. F. R. Co., 235 U. S. 151, 162, 59 L. Ed. 169, 174,

> "There is, however, an insuperable obstacle to the granting of the relief sought by this bill. It was filed, as we have seen, by five persons against five railroad corporations to restrain them from complying with the state statute. The suit had been brought before the law went into effect, and this amended bill was filed very shortly after. It contains some general allegations as to the discriminations in the supply of facilities and as to the hardships which will ensue. It states that there will be a 'multiplicity of suits', there being at least 'fifty thousand persons of the negro race in the state of Oklahoma' who will be injured and deprived of their civil rights. But we are dealing here with the case of complainants, and nothing is shown to entitle

them to an injunction. It is an elementary principle that, in order to justify the granting of this extraordinary relief, the complainant's need of it, and the absence of an adequate remedy at law, must clearly appear. The complainant cannot succeed because someone else may be hurt. Nor does it make any difference that other persons who may be injured are persons of the same race or occupation. It is the fact, clearly established, of injury to the complainant—not to others—which justifies judicial intervention. Williams v. Hagood, 98 U. S. 72, 74, 75, 25 L. ed. 51, 52; Marye v. Parsons, 114 U. S. 325, 328, 329, 29 L. ed. 205, 206, 5 Sup. Ct. Rep. 932, 962; Tyler v. Registration Ct. Judges, 179, U. S. 405, 45 L. ed. 252, 253, 21 Sup. Ct. Rep. 206; Turpin v. Lemon, 187 U. S. 51, 60, 47 L. ed. 70, 74, 23 Sup. Ct. Rep. 20; Davis and F. Mfg. Co. v. Los Angeles, 189 U. S. 207, 220, 47 L. ed. 778, 781, 23 Sup. Ct. Rep. 498; Hooker v. Burr, 194 U. S. 415, 48 L. ed. 1046, 1050, 24 Sup. Ct. Rep. 706; Braxton County Ct. v. West Virginia, 208 U. S. 192, 197, 52 L. ed. 450, 451, 28 Sup. Ct. Rep. 275; Collins v. Texas, 223 U. S. 288, 295, 296, 56 L. ed. 439, 443, 444, 32 Sup. Ct. Rep. 286."

Similarly, in order to complain successfully of acts as in violation of his Constitutional rights, a plaintiff must connect himself directly with the acts alleged.

"We said in Clark v. Kansas City, 176 U. S. 114, 44 L. ed. 392 (quoting from Cooley, Const. Lim. Sec. 196) that 'a court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect and who has therefore no interest in defeating it'. That is, a legal interest in defeating it. The objection of unconstitutionality of a statute must be made by one having the right to make it, not by a stranger to its grievance. * * *

We repeat, the questions which can be raised under any of the subdivisions of Section 5 of the

act [providing for writs of error in constitutional questions] must be real, the controversies they present must be substantial, not only from the nature of the principles involved, but from the relation of the party to them by whom they are invoked."

Lampasas v. Bell, 180 U. S. 276, 283-4, 45 L. ed. 527, 530.

The same principle is expressed and applied in

Stearns v. Wood, 236 U. S. 75, 59 L. ed. 475,

where the opinion reads as follows:

"The only serious attempt to show that appellant has a direct personal interest in the subject presented is found in the section of the bill which alleges that he is now serving as a major in the inspector general's department of the Ohio National Guard and is aggrieved because defendant Wood, the adjutant general of the state, is about to put into full force and effect a general order issued by command of the Secretary of War, and known as circular No. 8, which, without right or authority, directs that the maximum rank of senior officers in complainant's department shall be a lieutenant colonel, and if this is done he will be prevented from attaining and serving in the higher rank permitted by the existing laws of Ohio. * * *

The general orders referred to in the bill do not directly violate or threaten interference with the personal rights of appellant—a major in the National Guard, whose present rank remains undisturbed. He is not, therefore, in position to question their validity; and certainly he may not demand that we construe orders, acts of Congress, and the Constitution for the information of himself and others, notwithstanding their laudable feeling of deep interest in the general subject. The province of courts is to decide real controversies, not to discuss abstract propositions. Little v. Bowers, 134

U. S. 547, 557, 33 L. ed. 1016, 1020, 10 Sup. Ct. Rep. 620; California v. San Pablo & T. R. Co., 149 U. S. 308, 314, 37 L. ed. 747, 748, 13 Sup. Ct. Rep. 876 Richardson v. McChesney, 218 U. S. 487, 492, 54 L. ed. 1121, 1122, 31 Sup. Ct. Rep. 43; Missouri, K. & T. R. Co. v. Cade, 233 U. S. 642, 648, 58 L. ed. 1135, 1137, 34 Sup. Ct. Rep. 678."

In

Hundley v. Louisville & N. R. Co., 105 Ky. 162, 48 S. W. 429,

the Court of Appeals of Kentucky said (p. 431):

"The petition does not state a cause of action against the defendant. The averments that he had been deprived of the 'right' to again engage in the employment of other railroad companies, and that the alleged wrongful act had made it impossible for him to ever again get employment with other railroad companies, are mere conclusions of the pleader from the facts alleged. It should have been averred that he had sought, and been refused, employment by reason of the alleged wrongful act. An agreement made with other railroad companies not to employ defendant's discharged employes does not injure the plaintiff unless carried out. An averment that the defendant conspired and combined with other railroad companies to do an act, if unlawful, would not obviate the necessity of making the averment that he had sought and been refused employment by reason of the alleged wrongful act. Injury is the gist of the action. The liability is damages for doing, not for conspiracy. The charge of conspiracy does not change the nature of the act. In an action for damages, there must be some overt act, consequent upon the agreement to do a wrong, to give the plaintiff a standing in a court of law."

It is obvious that appellant has shown no direct injury to himself consequent upon appellees' acts. His own

refusal to work, based on a general claim that the practices of appellees are illegal is certainly insufficient to establish an injury to himself by appellees, even assuming that such practices are illegal. He must connect his injury directly and necessarily with appellees' acts, if the acts are per se illegal and with the combination, if it is the combination which makes the acts illegal. To do this he must at least *attempt* to obtain employment while complying only with such conditions as the employer may legally impose; he cannot sit back and have appellees' acts enjoined merely because they conflict with his *desires.*

The difficulty in appellant's case is that he misconceives the legal nature of employment. He has forgotten that all employment in this stage of society and government is by contract and that the right to be employed is dependent upon the wishes of the employer as well as the employee. Appellant claims that a seaman has a *right* to be employed on any ship he pleases and he calls this the right to engage in interstate and foreign commerce. (Note Assignment of Error, No. 22, Trans. p. 14. Also note argument in appellant's brief (pp. 42-3) to the effect that he has a right to *tender* his services and have them accepted, so that, as he claims, even *tender* is unnecessary where it is useless.) But the seaman does not engage in commerce himself, he is simply an employee of the ship owner or charterer who is actually engaged in commerce. The seaman has no more right to be employed than any person has a right to contract—in other words, his right is only to be employed if some employer wants to employ him and upon

the conditions that the two can mutually agree upon. If the employer chooses to make it a condition of employment that all employees wear overalls, and will not employ a man who does not wear them, it is solely a matter of contract between him and his employees, and no one could claim that he had a right to be employed without overalls. Similarly a condition requiring registration in an employment office is a matter of contract. Of course, a person has a right to a free *opportunity* to contract for employment, but nothing short of a black-list system, maliciously used or some other malicious combination is a violation of that right. The mere requirement that lawful conditions shall be met as a prerequisite to employment, even if the conditions are imposed by a group of employers, is not illegal. Appellant has shown no injury either from the conditions imposed or from the imposition of such conditions by a group of owners. He has treated the individual *acts as per se illegal* and has not attempted to show any damage to himself resulting therefrom; indeed there is no showing and it is not a fact that he has been prevented from obtaining employment.

In this connection, too, it is appropriate to note that appellant has stated no case for injunctive relief, because he has shown no irreparable injury to property, —no injury for which he has not an adequate remedy at law. Section 16 of the *Clayton Act* (Act of October 15, 1914, c. 323, Section 16, 38 Stat. 737), providing for injunctive relief for individuals under the anti-trust laws limits such relief to cases "when and under the same conditions and principles as injunctive relief against

threatened conduct that will cause loss or damage is granted by courts of equity." The section limits injunctive relief to cases of inadequate remedy at law, the time-honored equity jurisdiction. Moreover, Section 20 of the same Act (38 Stat. 738) is specially applicable to labor disputes and cases "growing out of" labor disputes, and this section also confines injunctive relief to cases where an irreparable injury to property or a property right is shown.

Appellant has shown no such threatened irreparable injury to a property right. The allegation in general terms of inadequate remedy at law (Complaint, par. XI, Transcript p. 4) is a mere conclusion and does not show irreparable injury.

Shelton v. Platt, 139 U. S. 591, 35 L. ed. 273;
Pullman Co. v. Tamble, 173 Fed. 200, 204.

II.

THIS IS NOT A PROPER CLASS SUIT.

Appellant has framed his bill for a class suit under Federal Equity Rule 38. But the question "of common or general interest to many persons constituting a class" required by that rule must be a direct pecuniary interest and must be a common interest in the subject-matter of the suit, as for example a common interest in property.

> "The interest that will allow parties to join in a bill of complaint, or that will enable the court to dispense with the presence of all the parties, when numerous, except a determinate number, is not only

> an interest in the question, but one in common in the subject-matter of the suit; such as the case of disputes between the lord of a manor and his tenants; or between the tenants of one manor and those of another. * * * There is scarcely a suit at law or in equity which settles a principle or applies a principle to a given state of facts, or in which a general statute is interpreted, that does not involve a question in which other parties are interested. * * * Yet no lawyer would contend that such an interest would justify a joinder of parties as plaintiffs."
>
> *Scott v. Donald*, 165 U. S. 107, 116, 41 L. ed. 648, 654,

This case is cited and the rule applied more particularly to Rule 38 in

> *Raich v. Truax*, 219 Fed. 273 (affirmed 239 U. S. 33, 60 L. ed. 131).
>
> *Ohio v. Cox*, 257 Fed. 334.

All of the cases cited by appellant in his brief (p. 33) in favor of his right to bring a class suit involve a common interest in property, most of them being cases brought by owners of lots in cemeteries or by congregations of churches whose property is owned in common.

The class of seamen whom appellant attempts to represent have no common interest in any property, or in any specific subject matter. At most they have only a partisan interest in the outcome of the suit, and even this interest may not be shared by all members of that class. Those seamen who are at present employed have only a vague and contingent future interest in the methods of employment; and there doubtless are many seamen who approve and support the employment

bureau as established. Appellant does not allege that all seamen are members of the union, nor that all seamen would prefer a return to the old conditions where union leaders were the employment agents. Although appellant complains that the registration system of appellees gives men jobs by turn and not by their qualifications (Complaint, par. VII, Trans. p. 3), [it is to be noted that this grievance is entirely inconsistent with the grievance next raised over the record system, which is obviously for the purpose of noting a seaman's qualifications and experience], still such a system of employment by turn, reasonably managed, may well appeal to very many seamen as fair and desirable. Appellant occupies no representative position, but if such were not the case, and he were a proper class representative, he would still be required to plead and prove an injury *to himself.*

> "The desire to obtain a sweeping injunction cannot be accepted as a substitute for compliance with the general rule that the complainant must present facts sufficient to show that his individual need requires the remedy for which he asks."
>
> *McCabe v. A. T. & S. F. R. Co.*, 235 U. S. 151, 164, 59 L. ed. 169, 175;
>
> *Raich v. Truax*, 219 Fed. 273, 283.

We repeat here what the District Judge said in his memorandum decision in this case (Trans. pp. 9-10):

> "Besides, the plaintiff is not shown to have any standing entitling him to seek in court the general relief for which he prays. He is not in a position to vindicate general governmental policies, nor is he the 'agency to establish the public welfare'. *Gasaway v. Borderland Coal Corp.*, 278 Fed. 56."

III.

APPELLANT HAS ESTABLISHED NO CASE UNDER THE ANTI-TRUST LAWS AND NO CASE OF ILLEGAL CONSPIRACY.

In his bill of complaint appellant alleged no diversity of citizenship, and he has sought federal jurisdiction upon the ground that there is a federal question in his case. Section 24 of the Judicial Code (36 Stat. 1091) requires an allegation of jurisdictional amount except in certain specified cases. In this case there is no allegation of jurisdictional amount and appellant's right to sue in the federal court must depend entirely upon his falling within one of those exceptions. The only possible exception is subsection 23 of Section 24, which states that federal district courts shall have jurisdiction:

> "Of all suits and proceedings arising under any law to protect trade and commerce against restraints and monopolies."

The federal anti-trust laws, however, only apply to matters directly affecting interstate commerce. This is well expressed by the words of this court in

> *Anderson v. U. S.* 171 U. S. 604, 615, 43 L. ed. 300, 305.
>
> "It has already been stated in the Hopkins case, above mentioned, that in order to come within the provisions of the statute the direct effect of an agreement or combination must be in restraint of that trade or commerce which is among the several states, or with foreign nations. Where the subject-matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate,

obstruct, or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental and not its purpose or object. * * * Otherwise, there is scarcely any agreement among men which has interstate or foreign commerce for its subject that may not remotely be said to, in some obscure way, affect that commerce and to be therefore void."

There are many cases to the same effect:

Hopkins v. U. S. 171 U. S. 578, 43 L. ed. 290;

U. S. v. E. C. Knight Co., 156 U. S. 1, 39 L. ed. 325.

Field v. Barber Asphalt Pav. Co., 194 U. S. 618, 48 L. ed. 1142;

Cincinnati P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 50 L. ed. 428;

Addyston Pipe & Steel Co. v. U. S., 175 U. S. 211, 44 L. ed. 136;

Blumenstock Bros. Ad. Agency v. Curtis Pub. Co., 252 U. S. 436, 64 L. ed. 649.

As we have shown heretofore in this brief (pp. 22-4), in our argument that appellees' acts were not a regulation of interstate commerce, the cases of

Adair v. U. S., 208 U. S. 161, 52 L. ed. 436,

and

Williams v. Fears, 179 U. S. 270, 45 L. ed. 186,

conclusively establish the field of employment as beyond the realm of matters which directly affect interstate commerce. But in addition to these cases, an analysis of the facts alleged by appellant fails to find any direct effect upon commerce. There is no claim of any attempt to raise prices or to lower wages. There is no showing of the slightest effect upon the commerce carried on by the ship owners who are members of appellee organizations, except the inference that such commerce is aided and enabled to exist at full capacity by the very employment office of which appellant complains. If it were the fact that appellant and other scattered individuals were kept from employment, there would be no effect upon this commerce as long as the employment office was able to recruit as many men as were needed, but there is not even an allegation that appellant or anyone else is kept from employment, for appellant's *refusal* to work is not a *prevention by appellees.*

Furthermore, this court has held that when a combination effects a direct restraint upon interstate commerce, the "rule of reason" must be applied.

Standard Oil Co. v. U. S. 221 U. S. 1, 55 L.ed. 619;

U. S. v. American Tobacco Co., 221 U. S. 106, 55 L. ed. 663;

U. S. v. Union Pacific R. Co., 226 U. S. 61, 57 L. ed. 124;

U. S. v. Reading Coal Co., 226 U. S. 324, 57 L. ed. 243;

Eastern States Retail Lumber Dealers' Association v. U. S., 234 U. S. 600, 58 L. ed. 1490;

Standard Fashion Co. v. Magrane-Houston Co., 258 U. S. 346, 66 L. ed. 653.

The case last cited shows that the same "rule of reason" is applied under the *Clayton Act* as under the *Sherman Act* alone.

Thus, even if there could be found in this case a restraint upon interstate commerce, of which there is no indication in the pleadings or the facts, it would not fall within the class of unreasonable restraints, for its intent would not be to restrain commerce but to employ capable seamen, and its effect would not be to restrain commerce within the meaning of preventive legislation. If appellant is harmed by appellees' acts, it is, therefore, not such a harm as falls within the anti-trust laws, but is cognizable only by state courts as actionable conspiracy.

When an individual can legally do a certain act, a combination of individuals to do the same act is legal, at least unless it is done for the malicious or wilful purpose of injuring some person or persons. Courts have held that an act lawful when done by one is always lawful even when done by many in combination, but even those authorities which hold that an act lawful when done by one may be unlawful when done by many in combination, confine the doctrine to cases where the act is done by the combination *maliciously* or with *intent to injure* other persons. This doctrine is well expressed in a leading case,

National Fireproofing Co. v. Mason Builders' Ass'n., 169 Fed. 259, 265,

as follows:

"The direct object or purpose of a combination furnishes the primary test of its legality. It is not every injury inflicted upon third persons in its operation that renders a combination unlawful. It is not enough to establish illegality in an agreement between certain persons to show that it works harm to others. An agreement entered into for the primary purpose of promoting the interests of the parties is not rendered illegal by the fact that it may incidentally injure third persons. Conversely, an agreement entered into for the primary purpose of injuring another is not rendered legal by the fact that it may incidentally benefit the parties. As a general rule it may be stated that, when the chief object of a combination is to injure or oppress third persons, it is a conspiracy; but that when such injury or oppression is merely incidental to the carrying out of a lawful purpose, it is not a conspiracy. Stated in another way: A combination entered into for the real malicious purpose of injuring a third person in his business or property may amount to a conspiracy and furnish a ground of action for the damages sustained, or call for an injunction, even though formed for the ostensible purpose of benefiting its members and actually operating to some extent to their advantage; but a combination without such ulterior oppressive object, entered into merely for the purpose of promoting by lawful means the common interests of its members, is not a conspiracy. A laborer, as well as a builder, trader, or manufacturer, has the right to conduct his affairs in any lawful manner, even though he may thereby injure others. So several laborers, and builders may combine for mutual advantage, and, so long as the motive is not malicious, the object not unlawful, nor oppressive and the means neither deceitful nor fraudulent, the result is not a conspiracy, although it may necessarily work injury to other persons. The damage to such persons may be serious—it may even extend to their ruin—but if it is inflicted by a combination in the

legitimate pursuit of its own affairs, it is damnum absque injuria. The damage is present but the unlawful object is absent. And so the essential question must always be whether the object of a combination is to do harm to others or to exercise the rights of the parties for their own benefit."

Many cases apply this rule:

Aikens v. Wisconsin, 195 U. S. 194, 49 L. ed. 154;

Allis-Chalmers Co. v. Iron Moulders Union No. 125, 150 Fed. 155 (modified without change of principle, 166 Fed. 45, 91 C. C. A. 631);

Vegelahn v. Guntner, 167 Mass. 92, 44 N. E. 1077;

National Protective Association v. Cumming, 170 N. Y. 315, 63 N. E. 369;

Cornellier v. Haverhill Shoe Mfrs. Assoc., 221 Mass. 554, 109 N. E. 643;

Doremus v. Hennessey, 176 Ill. 608, 52 N. E. 924;

Brown v. Jacobs Pharmacy Co., 115 Ga. 429, 41 S. E. 553;

West Virginia Transp. Co. v. Standard Oil Co., 50 W. Va. 611, 40 S. E. 591.

In the present case, it is not a fact and appellant does not allege as a fact, that appellees' acts are performed with any malicious intent or with any intent to do injury to any person or class of persons. It is obvious that the maintenance of an employment bureau by one ship owner alone is not illegal. How then can its maintenance by a group of employers be illegal in the absence of an intent to injure, or rather when the only intent is to maintain a continuous, dependable, and efficient supply of seamen for the ships of members?

Appellant does not allege any attempt or intent to injure seamen. He does not complain of an attempt to lower wages, to deprive men of work, or to interfere with employment. He talks of threats and intimidation (Appellant's Brief, p. 38) but such threats and intimidation comprise merely the announcement of appellees that they will only employ through the offices and in the manner there established. If that is intimidation every employer who tells a prospective employee the conditions of employment is guilty of using threats and intimidation. Appellant refers to the keeping of employment records as a blacklist (Appellant's Brief, p. 34), but he does not allege that they are used as such. There is no claim or showing that these records are used to injure any persons or discriminate against members of the unions. The claim of a blacklist is entirely inconsistent with his complaint that men are hired in turn according to their registration.

If, however, the records were used for purposes of blacklisting, that action would not be illegal unless done maliciously or with intent to injure. If done solely for the purpose of securing efficient and capable seamen for appellees' ships, it would be legal, although its result would be to exclude certain men from employment.

Goldfield v. Miners, 159 Fed. 500;

Gasaway v. Borderland Coal Corp., 278 Fed. 56;

Sinsheimer v. United Garment Workers, 28 N. Y. S. 321;

Cornellier v. Haverhill Shoe Mfrs. Assoc., 221 Mass. 554, 109 N. E. 643;

Hoban v. Dempsey, 217 Mass. 166, 104 N. E. 717;
Hebner v. Great Northern R. Co., 78 Minn. 289, 80 N. W. 1128;
Heffernan v. Whittlsey, 126 Minn. 163, 148 N. W. 63;
Willis v. Muscogee Mfg. Co., 120 Ga. 597, 48 S. E. 177;
Rhodes v. Granby Cotton Mills, 87 S. C. 18, 68 S. E. 824;
Hundley v. Louisville and N. R. Co., 105 Ky. 162, 48 S. W. 429;
Wabash R. Co. v. Young, 162 Ind. 102, 69 N. E. 1002.

There is no allegation of malice or wilful intent to injure; there is no allegation that the records are used as a blacklist at all. Appellant cannot, consistently with fact, allege that they are so used, but nevertheless, he attempts by argument to induce this court to infer that such is the case and to procure an order enjoining not only the use of appellees' records for any purpose, but its entire employment office system. Appellant confuses his desires with his rights.

Decisions not here considered are cited in appellant's brief; we do not refer to them here because they have on numerous occasions been before the court in other cases, and in no way alter the principles applicable in this case. It may not, however, be amiss for us to point out that the passages quoted in appellant's brief (beginning p. 13) from the case of

The Mogul S. S. Co. Ltd. v. McGregor, et al., L. R. 23 Q. B. (1889) 598,

following the statement that "the learned court, speaking through the very able and distinguished Lord Esher, says as follows:" are in reality from the opinion of Lord Esher, but that opinion, although printed first in the reports, is *not the opinion of the Court of Appeal, but is the dissenting opinion of Lord Esher.* The three judges delivered separate opinions in order and both Bowen, L. J. and Fry, L. J. held against Lord Esher and in favor of the legality of the combination. However, Lord Esher's remarks as quoted do not help appellant.

IV.

APPELLANT HAS ESTABLISHED NO OTHER CASE FOR EQUITABLE RELIEF.

In our argument on the motion to dismiss this case, we covered fully (see pp. 10-31 ante) appellant's claims of constitutional grounds for relief by showing that all of such claims were frivolous and unsubstantial. We shall not repeat that argument here.

Similarly, we showed that appellees' acts do not violate the Shipping Commissioners' Act (Revised Statutes, Sec. 4501, et seq.) in our argument ante to the effect that appellees' acts do not conflict with Congressional regulation of interstate commerce and thus do not give the right to appeal directly to the Supreme Court. We refer to that argument here (see pp. 12-22 ante); we also add that even if appellees' acts should be held to violate the Shipping Commissioners' Act, that act contains adequate provisions for legal remedies, and there would be no ground for an injunction.

Summary.

We have now discussed the merits of appellant's case from every side, assuming *for this purpose only* that a direct appeal to the Supreme Court is proper. We have shown that appellant's complaint does not sufficiently connect him with appellees' acts; that his case is not proper for a class suit; that he has no case under the anti-trust laws and none for actionable conspiracy; and lastly that he has no case under the Constitution or under the Shipping Commissioners' Act. Therefore we respectfully urge that, if our motion to dismiss be not granted, the decree of the lower court dismissing appellant's complaint be affirmed.

Dated, San Francisco,
September 26, 1923.

Respectfully submitted,

W. F. SULLIVAN,
Counsel for Appellee,
Shipowners' Association of the Pacific Coast.

EDWARD J. MCCUTCHEN,
J. M. MANNON, JR.,
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Pacific American Steamship Association.

ADMISSION OF SERVICE.

Due service and receipt of a copy of the within Notice of Motion, Motion and Brief is hereby admitted this.....day of September, 1923.

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Attorney for Appellant.